UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 64 | Number 1 Article 11

11-1-1985

Sunbathers Versus Property Owners: Public Access to North Carolina Beaches

Alice Gibbon Carmichael

Sunbathers Versus Property Owners: Public Access to North Carolina Beaches

But look! here come more crowds, pacing straight for the water, and seemingly bound for a dive. Strange! Nothing will content them but the extremest limit of the land; loitering under the shady lee of yonder warehouses will not suffice. No. They must get just as nigh the water as they possibly can without falling in. And there they stand—miles of them—leagues. Inlanders all, they come from lanes and alleys, streets and avenues—north, east, south, and west. Yet here they all unite.[1]

H. Melville

I. INTRODUCTION

Increasing public use of coastal beach property and increasing private development along the oceanfront[2] are intensifying the inevitable conflicts between private beach owners and the public. These beach battles[3] are forcing into litigation the question of public rights in coastal beach land.[4] The nature of these rights varies from state to state, but the trend in most jurisdictions is toward recognition of a legal right of the public to access and use the beaches.

A property owner[5] can hinder public use of beaches by obstructing the beach area or otherwise restricting its use, or by denying access to it. The issue of "beach access" involves both aspects—the right of the public to use the dry-

1. H. MELVILLE, MOBY DICK 3 (Rinehart Press, 1957).

2. Comparisons of travelers' expenditures between 1970 and 1982 in five North Carolina coastal counties illustrate the growth of tourism. In Brunswick County (Ocean Isle, Southport, and Long Beach) expenditures increased 701.4%. In Carteret County (Atlantic Beach, Beaufort, and Emerald Isle) the increase was 1,025.5%. In Currituck County (Knotts Landing, Corolla, Waterlily) the increase was 168.4%. In Dare County (Kitty Hawk, Nags Head, and Kill Devil Hills) the increase was 2,778%, and in New Hanover County (Carolina Beach, Wilmington, and Wrightsville Beach) the increase was 611.4%. These percentages were calculated from figures reported in NORTH CAROLINA STATE DATA CENTER, RESEARCH AND PLANNING SERVICES, OFFICE OF STATE BUDGET AND MANAGEMENT, NORTH CAROLINA GOVERNMENT STATISTICAL ABSTRACT 480-81 (5th ed. 1984).

The number of permanent residents in these counties also has increased significantly. Between 1970 and 1980 the population of Brunswick County increased 47.7%. In Carteret County the increase was 30%. In Currituck County the increase was 59%. In Dare County the increase was 91.2%, and in New Hanover County the increase was 24.7%. *Id.* at 24. Projected population figures for 1983 predicted significantly higher increases between 1970 and 1983. In Brunswick County the predicted increase was 69.9%. In Carteret County it was 44.1%; in Currituck County, 80.4%; in Dare County, 119.1%; and in New Hanover County, 31.1%. NORTH CAROLINA STATE DATA CENTER RESEARCH AND PLANNING SERVICES, OFFICE OF STATE BUDGET AND MANAGEMENT, PROFILE NORTH CAROLINA COUNTIES UPDATE 140-62 (Sept. 1984).

Private development has kept pace. In the Currituck Outer Banks over eight thousand lots "have been plotted and many have been developed." T. SCHOENBAUM, ISLANDS, CAPES, AND SOUNDS: THE NORTH CAROLINA COAST 273 (1982). The Dare County beaches are developing "right up to the entrance of the Cape Hatteras National Seashore," and the beaches south to Cape Fear "are already blanketed with motels, shopping centers, and beach cottages, and more of the same is planned." *Id.*

3. In Maine, beach property owners have built fences, thrown rocks, and towed cars in an effort to keep the public off their land. Martha's Vineyard property owners have begun hiring guards to keep private property private. Serrill, *The Gritty Battle for Beach Access*, TIME, Aug. 27, 1984, at 48.

4. *See* cases cited *infra* note 21.

5. The terms "property owner," "landowner," or "littoral owner" will be used to refer to a person owning oceanfront property. "Riparian owner" will refer to a person owning river or stream property.

sand[6] and foreshore[7] areas of the beach and the right of the public to gain access to those areas across private uplands.[8]

A determination of title to the beach and uplands does not solve the problem of beach access because the right asserted by the public is use, not ownership, of the land.[9] Accordingly, the property interest granted to the public in a beach access case is an easement[10] delimited by the kind of use that gave rise to the easement.[11] Any use is permissible so long as it is within the general classification of public uses related to the sea.[12] Thus, one asserting a right of public use of the beach may bring a shovel to build a sand castle but not a drilling rig to build an oil well.[13]

Legislation and judicial decisions evince a public policy that the unique nature of beach land requires that it be treated differently from inland property.[14] Under this policy, public use of the beaches is understood to derive from the

---

6. The dry-sand beach is the stretch of beach between the mean high-tide line and the line of vegetation or dune line. D. BROWER, W. DREYFOOS, L. EPSTEIN, J. PANNABECKER, N. STROUD & D. OWENS, ACCESS TO THE NATION'S BEACHES: LEGAL AND PLANNING PERSPECTIVES 20 (1978) [hereinafter cited as ACCESS TO THE NATION'S BEACHES].

7. The foreshore or wet-sand beach is the area between the mean low-tide line and the mean high-tide line. *Id.* at 19-20. This area also is referred to as the tidelands. *See* BLACK'S LAW DICTIONARY 1329 (5th ed. 1979). For the practical importance of the tidelands in determining the scope of public rights, see Hughes v. Washington, 389 U.S. 290 (1967) (state cannot extend its ownership to land beyond tidelands); Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10 (1935) (tidelands belong to state).

8. The upland is landward of the vegetation line. ACCESS TO THE NATION'S BEACHES, *supra* note 6, at 20; *see also* Maloney & Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C.L. REV. 185 (1974) (discussion of measurement of tidal lines).

Other public rights in the North Carolina coastal area are discussed in Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. REV. 1 (1972). *See also* ACCESS TO THE NATION'S BEACHES, *supra* note 6 (discussion of public access from a planning perspective); R. DUCKER, DEDICATING AND RESERVING LAND TO PROVIDE ACCESS TO NORTH CAROLINA BEACHES (1982) (discussion of public access from a planning perspective).

9. *See* Eckhardt, *A Rational National Policy on Public Use of the Beaches*, 24 SYRACUSE L. REV. 967, 971 (1973).

10. The easement is both negative and affirmative; it prevents the property owner from obstructing the public's use of the property (e.g., by building fences or seawalls) and allows the public limited use rights. The landowner retains the fee simple interest and can make use of the land in ways consistent with the easement. 3 R. POWELL, REAL PROPERTY ¶ 424, at 34-258 to -260 (1984); *see also* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974) (defendant's construction of sea tower consistent with public recreational use).

11. *See* J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 344 (2d ed. 1975) ("[T]he nature of the use which established the easement sets its scope as well.").

12. Such uses as sunbathing, camping, swimming, fishing, walking, and other recreational uses have been found sufficient to create an easement. *See* Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Civ. App. 1964).

13. Eckhardt, *supra* note 9, at 971.

14. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974) ("The beaches of Florida are of such a character as to use . . . as to require separate consideration from other lands . . . ."); *see also* State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (unique nature of beach land requires application of ancient doctrine of custom).

Many judges have written lyrically of the uniqueness of beach land. Writing for the Florida Supreme Court in White v. Hughes, 139 Fla. 54, 190 So. 446 (1939), Justice Brown commented:

> There is probably no custom more universal, more natural or more ancient, on the seacoasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. Many are

land as an inevitable right.[15] The rationale for recreational beach easements, then, may be the unique nature of beach land, rather than any favoring of the rights of the public.[16] Judicial hostility to private beachowners' obstruction of public access is best understood in the context of this public policy. One English judge argued on principles of public policy that

> the interruption of free access to the sea is a public nuisance . . . . The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbors.[17]

There is no established right of public access to North Carolina beaches.[18] This Comment suggests an "open beach" policy[19] for North Carolina that will ensure a public right to use and gain access to its beaches.[20] Judicial remedies are analyzed and their possible use in North Carolina evaluated. Legislation from other jurisdictions is examined to illustrate statutory solutions and resulting problems. Present North Carolina beach access acquisition legislation is discussed, as well as the need for and likely impact of further legislation. Finally, the Comment recommends expansion of the public trust doctrine by the North Carolina courts as the best judicial method to provide public beach access in North Carolina.

II. PRESCRIPTION, IMPLIED DEDICATION, AND CUSTOM: WHEN PUBLIC USE BECOMES A PUBLIC RIGHT

The common-law theories of prescription, implied dedication, and custom have been used to claim public rights in beach property.[21] Although each has its

---

> they who have felt the life-giving touch of its healing waters and its clear dust-free air. Appearing constantly to change, it remains ever essentially the same.

Id. at 58-59, 190 So. at 448-49.

15. *See* State *ex rel.* Thornton v. Hay, 254 Or. 584, 599, 462 P.2d 671, 678 (1969) (ruling upholding public easement in dry sand area merely confirmed a public right).

16. *See* Eckhardt, *supra* note 9, at 980 (Beach access cases "take into account the special character of the beach and the public interest therein.").

17. Blundell v. Catterall, 5 B. & Ald. 268, 275, 106 Eng. Rep. 1190, 1193 (K.B. 1821) (Best, J., dissenting).

18. *See* T. SCHOENBAUM, *supra* note 2, at 254.

19. An open beach policy would combine judicial decisions and legislation to protect the rights of public access and use of the beaches, prohibit interference with these rights, and authorize the acquisition of accessways. The phrase "open beach" is taken from proposed federal legislation. *See infra* note 295.

20. Most North Carolinians already "consider the [beaches] to be open [to the public] at least up to the frontal dunes." T. SCHOENBAUM, *supra* note 2, at 253. Indeed, vacationers using the North Carolina beaches "do not stay seaward of the high-water mark." *Id.* Of North Carolina's 308 miles of ocean shoreline, 148 miles are publicly owned. UNITED STATES DEPARTMENT OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED COASTAL MANAGEMENT PROGRAM FOR THE STATE OF NORTH CAROLINA 120 (1978). For most of these public beaches, public access is not a problem. *Id.* Likewise, public access to the 160 miles of privately owned beaches traditionally has not been denied. *Id.* at 121. Perhaps because of this, "no provisions have been made to insure [sic] that [public access] will not be a problem in the future." *Id.*

21. *See* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (per

unique elements of proof, the common underlying assumption is that customary use by the public of beach property can evolve into a public right.[22] This section discusses representative cases under each theory and analyzes relevant North Carolina law.

A. *Prescriptive Easements*[23]

A prescriptive easement is an easement in the land of another acquired through continuous use.[24] Prescription means literally "before written,"[25] and the common-law theory was that use for a long period of time raised a presumption that the user "had at some past time received a grant of the . . . interest used."[26] Thus, a long, continuous, and peaceable use was necessary to establish a prescriptive right.[27] Most American courts, however, have equated prescription with adverse possession[28] and have required the use to be continuous, uninterrupted,[29] adverse,[30] under a claim of right,[31] and for a statutory period of time.[32]

---

curiam) (public rights to use and access beach held established by implied dedication); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974) (observation tower on beach held not inconsistent with public's prescriptive rights of use); State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (public rights of use established by custom); Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Civ. App. 1964) (public held to have prescriptive rights in beach). For an interesting discussion of the development of the "common law" of beach access and its economic efficiency, see Roberts, *Beaches: The Efficiency of the Common Law and Other Fairy Tales*, 28 UCLA L. REV. 169, 170-87 (1980).

22. *See infra* text accompanying notes 24, 75, & 105.

23. For a general discussion of prescriptive easements in beaches, see Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription*, 24 SYRACUSE L. REV. 935 (1973).

24. 3 R. POWELL, *supra* note 10, ¶ 413, at 34-103 to -104.

25. *Id.* at 34-103.

26. Stoebuck, *The Fiction of Presumed Grant*, 15 U. KAN. L. REV. 17, 20 (1966). Long use was defined as use going back to the "limit of English legal memory," which was 1189. *Id.* at 19. This was the same time period necessary to establish a custom. *See infra* note 104. In order to perpetuate the fiction, however, the English courts "created a further presumption" that "proof of user as far back as living witnesses could recall showed user on back to 1189." Stoebuck, *supra*, at 20.

27. 3 R. POWELL, *supra* note 10, ¶ 413, at 34-103 n.3.

28. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 8.7, at 451 (1984). Technically, adverse possession involves ownership, whereas prescription involves use. *Id.* at 451-52.

29. 3 R. POWELL, *supra* note 10, ¶ 413, at 34-124 to -128. "Continuous" refers to the easement claimant's behavior and activity. "Uninterrupted" refers to the behavior and activity of the landowner. J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA § 321, at 345-46 (1981).

30. Adverse use is use "not . . . made in subordination to [the landowner]." 3 R. POWELL, *supra* note 10, ¶ 413, at 34-107 to -13. This definition, however, does not require that the "user's intent . . . violate another's rights." *Id.* at 34-112.

31. A claim of right is merely the nonrecognition of the owner's authority either to prevent or permit the use. RESTATEMENT OF PROPERTY § 458 comment c (1944); *see also* Potts v. Burnette, 301 N.C. 663, 668, 273 S.E.2d 285, 289 (1981) ("Although there was no evidence that plaintiffs thought they owned the road, . . . [they] considered their use of [it] to be a *right* and not a privilege.").

32. RESTATEMENT OF PROPERTY § 460 (1944). The statutory period varies from state to state, but is usually between five and twenty-five years. *See* 3 R. POWELL, *supra* note 10, ¶ 413, at 34-130 to -131 nn.58-59. Most courts have applied adverse possession statutes by analogy to create the prescriptive period. 2 AMERICAN LAW OF PROPERTY § 8.52, at 267 (A. Casner ed. 1952); *see, e.g.*, Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974) (court used adverse possession statute to establish prescriptive period of twenty years).

In *City of Daytona Beach v. Tona-Rama, Inc.*,[33] the First District Court of Appeals of Florida found a prescriptive easement in favor of the public in appellee's oceanfront property.[34] The City of Daytona Beach had granted a building permit to an amusement corporation, allowing the corporation to build an observation tower on the corporation's beach property. A group of local citizens sought to enjoin the construction, claiming public use established a prescriptive easement in the property.[35] In finding for plaintiffs the court stated that the public had "continuously and uninterruptedly used and enjoyed the soft sand area of the beach . . . as a recreation area" for more than twenty years.[36] Sporadic exercises of authority by the property owners were insufficient to preserve their rights against the public.[37]

The Florida Supreme Court reversed,[38] however, holding that the public's use of the beach property was not against the owners' interests but "in furtherance" of them.[39] Although it acknowledged that prescriptive easements could arise in beaches,[40] the court concluded that because the property owners operated an oceanfront business open to the public, they had not lost anything by public use of the beach; thus, there was no invasion of the owners' right to the property.[41] "Unless the owner loses something," the court stated, the "public [can] obtain no easement by prescription."[42]

Several considerations militate against the use of prescription to establish public rights in beach property. The first problem with prescription, evidenced by *Tona-Rama*, occurs when the property owner operates an oceanfront business open to the public. In such cases, the court may hold that public use furthers the interests of the property owner and thus fails to meet the requirement of adverse use. The second problem is that of establishing the evidence of adverse use needed to create a public beach easement. Because the easement is in

33. 271 So. 2d 765 (Fla. Dist. Ct. App. 1972) (on rehearing), *rev'd*, 294 So. 2d 73 (Fla. 1974).

34. *Id.* at 770.

35. *Id.* at 766.

36. *Id.*

37. *Id.* at 767. Other Florida cases have recognized the concept of a prescriptive easement in beach property. *See* City of Miami Beach v. Undercliff Realty & Inv. Co., 155 Fla. 805, 21 So. 2d 783 (1945); City of Miami Beach v. Miami Beach Improvement Assoc., 153 Fla. 107, 14 So. 2d 172 (1943). The court in both cases, however, declined to find prescriptive easements because of the absence of adverseness in the public's use of private beach land.

38. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974). For a further discussion of this case see Note, *Doctrine of Customary Rights—Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest*, 2 FLA. ST. U.L. REV. 806 (1974).

39. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974). The court also noted that even if a prescriptive easement were found, defendants' observation tower would not be inconsistent with the public use and could remain on the beach. *Id.*

40. *Id.* at 75.

41. *Id.* at 78. Specifically, the use was not adverse to the owner.

42. *Id.* at 77; *see also* Spiegle v. Borough of Beach Haven, 116 N.J. Super. 148, 158, 281 A.2d 377, 382 (1971) (use of unimproved land presumed permissive when there is "no actual deprivation of any beneficial use to the owner"). Not all courts require evidence that the property owner lost something. In North Carolina, however, the presumption of permissive use suggests that when a landowner benefits from public use of the upland, a claimant must show a loss to the landowner's interests by use of the dry-sand area in order to overcome the presumption that the public's use was permissive. *See infra* note 51 and accompanying text.

favor of the public, copious evidence of continuous public use must be produced.[43] Evidence of use by isolated individuals will not be sufficient.[44] A third problem with prescription is that easement rights can be established only in the particular piece of property that is the subject of the litigation.[45] At least one court has been deterred from relying on prescription because of the possibility that doubtful prescription cases could "fill the courts for years with tract-by-tract litigation."[46]

Finally, given the seasonal nature of recreational use of the beach, proving continuous, uninterrupted use may be a problem. Courts that have recognized prescriptive easements in beach property, however, have found ways to avoid this problem. The Texas Court of Civil Appeals, for example, found evidence of seasonal use of the beach sufficient to establish continuous use.[47] The lack of any evidence of swimming during the winter months was not dispositive because "it is a matter of common knowledge that climatic conditions are certainly suitable for swimming . . . six months of the year."[48] The public, therefore, was limited to use of the beach for swimming during those months when it was climatically possible; nonuse during the other months did not cause the claim to fail for lack of continuous use. North Carolina case law on prescriptive easements supports the Texas court's analysis.[49] The North Carolina Supreme Court has stated that "possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the prop-

43. The easement must be used by members of the public, not just isolated individuals. 2 AMERICAN LAW OF PROPERTY, *supra* note 32, § 9.50c, at 483. Public use, however, has been defined as use by persons who are not separable from the public generally. Olsen v. Erie R.R. Co., 99 N.J.L. 485, 487, 124 A. 367, 368 (1924). Establishing evidence of public use may be particularly problematic in the case of remote beaches. *See* Texas Law Institute of Coastal and Marine Resources, The Beaches: Public Rights and Private Use (Conference Proceedings, Jan. 15, 1972) ("[The Texas Court of Civil Appeals' decision in Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Civ. App. 1964)] might not be sufficient . . . to protect some of the slightly more remote beaches . . . . There might not be a similarly clear long [public] use to establish a prescriptive right . . . .").

44. 2 AMERICAN LAW OF PROPERTY, *supra* note 32, § 9.50c, at 483.

45. *See* State *ex rel.* Thornton v. Hay, 254 Or. 584, 595, 462 P.2d 671, 676 (1969); *see also* City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765, 770 (Fla. Dist. Ct. App. 1972) (on rehearing) (emphasizing that ruling applies only to disputed tract), *rev'd*, 294 So. 2d 73 (Fla. 1974).

46. State *ex rel.* Thornton v. Hay, 254 Or. 584, 595, 462 P.2d 671, 676 (1969). The court relied instead on custom. Other courts, although finding prescriptive easements, have not based their holdings on them. *See* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 38, 465 P.2d 50, 55, 84 Cal. Rptr. 162, 167 (1970) (per curiam) (court recognized prescription as an alternative basis for its holding); Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Civ. App. 1964) (court recognized a prescriptive easement in dry-sand beach, but based holding on implied dedication).

47. Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 936 (Tex. Civ. App. 1964). Evidence showed that the beach was used heavily during the summer months for fishing, swimming, and general recreation; during the winter months, however, the area was used only for fishing. The court characterized the evidence as demonstrating "yearly, continuous and indiscriminate use by members of the general public." *Id.* at 934; *see also* Ivons-Nispel, Inc. v. Lowe, 347 Mass. 760, 761, 200 N.E.2d 282, 283 (1964) (use from summer to summer held to be sufficient). *But see* Speigle v. Borough of New Haven, 116 N.J. Super. 148, 281 A.2d 377 (1971) (seasonal fishing, swimming, and sunbathing not sufficient).

48. Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 934 (Tex. Civ. App. 1964). The essence of the court's argument was that because the ocean is unsuitable for swimming six months of the year, the public's nonuse of it for swimming during the winter months did not evidence a lapse in the public's claim.

49. *See, e.g.*, Vance v. Guy, 223 N.C. 409, 27 S.E.2d 117 (1945).

erty to the only use of which it is susceptible."[50]

North Carolina law, however, poses additional problems to the use of prescription for beach access. The permissive presumption rule, which creates a presumption that use is permissive until the contrary is shown,[51] makes it difficult to establish adverse use. The analogy of prescription to adverse possession[52] and North Carolina's recognition of "neighborly courtesy"[53] may account for the presumption, but it is more likely that the courts, traditional guardians of private property, are cautious about granting the public rights in such property.

The North Carolina courts also require that one claiming a prescriptive easement produce evidence that use was confined to a definite and specific area.[54] Furthermore, although there may be "slight deviations in the [area] of travel there must be . . . substantial identity" of the easement claimed.[55] When

50. *Id.* at 413, 27 S.E.2d at 120; *see also* Dickinson v. Pake, 284 N.C. 576, 581, 201 S.E.2d 897, 901 (1974) (" 'The continuity required is that the use be exercised more or less frequently, according to the purpose and nature of the easement.' ") (quoting J. WEBSTER, *supra* note 29, § 288).

51. Dickinson v. Pake, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974); *accord* Speight v. Anderson, 226 N.C. 492, 39 S.E.2d 371 (1946); Darr v. Carolina Aluminum Co., 215 N.C. 768, 3 S.E.2d 434 (1939); Perry v. White, 185 N.C. 79, 116 S.E. 84 (1923); Nash v. Shute, 184 N.C. 383, 114 S.E. 470 (1922); State v. Norris, 174 N.C. 808, 93 S.E. 950 (1917); Snowden v. Bell, 159 N.C. 497, 75 S.E. 721 (1912). This presumption is contrary to common law and does not exist in the majority of states. G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 337, at 175, § 350, at 292-95 (1961). When unenclosed land is involved, however, many jurisdictions that normally apply the common-law presumption of hostile use will apply the presumption of permissive use. *Id.* § 350, at 306 ("Courts more readily infer an adverse user when the way passes through inclosed land than when it runs across open territory."); *see, e.g.*, Boullioun v. Constantine, 186 Ark. 625, 54 S.W.2d 986 (1932) (use of unenclosed land presumed permissive); Todd v. Sterling, 45 Wash. 2d 40, 273 P.2d 245 (1954) (use of unenclosed land presumed permissive); *see also* Spiegle v. Borough of Beach Haven, 116 N.J. Super. 148, 158, 281 A.2d 377, 382 (1971) ("[W]here land is in a general state of nature and left unimproved by its owner, sporadic or even customary use of such property by a mere user is presumably permissive if there has been no actual deprivation of any beneficial use to the owner."). For a more detailed discussion of the development of the presumption in North Carolina, see Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974). The North Carolina Supreme Court in Potts v. Burnette, 301 N.C. 663, 273 S.E.2d 285 (1981) refused to adopt the common-law presumption of hostile use, adhering instead to the presumption of permissive use.

The theory of permissive use holds that when an owner gives no objection to use of the property, the owner is giving permission. *See* Henry v. Farlow, 238 N.C. 542, 544, 78 S.E.2d 244, 245 (1953) ("[The] circumstance that the owners of the soil did not object to the use of the way harmonizes with the theory that they permitted use of the way."). A recent North Carolina Supreme Court decision, however, suggests a narrower reading of the presumption. In West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985), testimony established that on several occasions a guard employed by respondents to prohibit public access over their property had opened a gate for a traveler who insisted that he was going to cross respondents' property. The court held that this evidence was sufficient to rebut the presumption of permissive use. *Id.* at 52, 326 S.E.2d at 612. A witness' statement that he "was not given permission to go through [the gate]," *id.*, apparently overcame the presumption.

52. *See* Potts v. Burnette, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981) ("An easement by prescription, like adverse possession, is not favored in the law . . . ."); *see generally* Note, *Prescriptive Acquisition in North Carolina*, 45 N.C.L. REV. 284, 287-95 (1966) (discussion of development of prescription in North Carolina).

53. *See* Weaver v. Pitts, 191 N.C. 747, 749, 133 S.E. 2, 3 (1926) ("It is only when the use of the path or road is clearly adverse to the owner or the land, and not an enjoyment of neighborly courtesy" that a prescriptive easement can be found.). Neighborly courtesy encourages landowners not to fence in their property.

54. Speight v. Anderson, 226 N.C. 492, 496, 39 S.E.2d 371, 374 (1946); Cahoon v. Roughton, 215 N.C. 116, 119, 1 S.E.2d 362, 364 (1939).

55. Dickinson v. Pake, 284 N.C. 576, 581, 201 S.E.2d 897, 901 (1974); *accord* Hemphill v. Board of Aldermen, 212 N.C. 185, 188, 193 S.E. 153, 155 (1937).

the easement is for use of the dry-sand area, there should be no problem with identification.[56] Coastal dynamics (shifting sands and storms), however, may make identification of a particular strip of upland difficult.

A recent North Carolina Supreme Court decision, *West v. Slick*,[57] applied the "substantial identity" test to beach land in the North Carolina Outer Banks. Petitioners sought to restrain respondents from blocking public access across respondents' beach property.[58] They also sought to establish two roads across the land as neighborhood public roads and as public roads by prescription or dedication. The first road, the "Inside Road," ran along the inside of the outer banks along the Currituck Sound.[59] The second road, the "Pole Line Road," was located behind the sand dune line on the ocean side of the banks.[60] The North Carolina Court of Appeals had found the evidence insufficient as a matter of law to establish the location of either roadway with reasonable certainty.[61] The supreme court, however, relying on aerial photographs and testimony of local residents, held that the evidence of substantial identity was sufficient to take the case to the jury.[62] The court found that the location of the Inside Road had never deviated;[63] the location of the Pole Line Road had deviated, but the court held that the deviation was slight and therefore within the requirements of the substantial identity test.[64]

---

56. The dry-sand beach is always defined by the high-tide and vegetation lines. To find a prescriptive easement in this area, however, it might be necessary for the North Carolina courts to adopt the concept of a "rolling easement." An easement in the dry-sand area naturally follows the shoreline as the line of mean low water changes from time to time by the natural forces of erosion. This concept of a rolling or shifting easement was first applied in Mercer v. Denne, [1905] 2 Ch. 538, in which the court held that a right to dry fishing nets on a beach attached to a new beach area created by accretion. It also has been applied in two Texas district court cases. *See* Feinman v. State, No. 125,882 (Dist. Ct. of Galveston County, 10th Judicial Dist. of Texas, 1984); Galveston East Beach, Inc. v. State, No. 93,893 (Dist. Ct. of Galveston County, 10th Judicial Dist. of Texas, 1964).

The North Carolina Supreme Court implicitly recognized a rolling easement in Carolina Beach Fishing Pier v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 573 (1970). The court stated that "[i]t is a general rule that where the location of the margin . . . of a . . . body of water . . . is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin . . . as so changed remains the boundary line . . . ." *Id.* at 304, 177 S.E.2d at 517 (quoting 56 AM. JUR. *Waters* § 477 (1947)). Thus, plaintiff's land was held to have been reclaimed by the sea, its title divested by the tides. *Id.*

57. 313 N.C. 33, 326 S.E.2d 601 (1985).

58. Respondents' property was sand dune and marsh property that comprised four miles of the outer banks between the Currituck-Dare County line and the Village of Corolla. *Id.* at 37, 326 S.E.2d at 603-04.

59. *Id.* at 41, 326 S.E.2d at 606.

60. *Id.* at 43, 326 S.E.2d at 606.

61. West v. Slick, 60 N.C. App. 345, 348, 299 S.E.2d 657, 660 (1983), *rev'd*, 313 N.C. 33, 326 S.E.2d 601 (1985). The court of appeals apparently interchanged the terms "reasonable certainty" and "substantial identity."

62. *Slick*, 313 N.C. at 45, 326 S.E.2d at 608.

63. *Id.* at 44-45, 326 S.E.2d at 608.

64. *Id.* The road's location along established telephone line poles may have aided identification. The court cited testimony and aerial photographs as the bases for its holding and noted that "[a]lthough the blowing sand sometimes filled the tracks, the roadway was always discernible." *Id.* at 44, 326 S.E.2d at 608; *cf.* Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 939 (Tex. Civ. App. 1964) ("The line of vegetation and the line of low tide mark the route. . . . The nature of the terrain and the use made gave sufficient notice to the owner of the extent and location of the route claimed.").

The *Slick* decision suggests that the North Carolina Supreme Court will apply the substantial identity test liberally when considering beach easements.[65] Although the easements at issue were not accessways to the beach, but rather roadways for local residents, their location on the dry-sand beach provides an analogy to beach access cases. The *Slick* decision, however, merely clarifies one aspect of North Carolina prescriptive easement requirements and is not helpful in predicting how the other elements will be applied to beach access cases. A beach access claimant still faces the difficult task of proving adverse use and of overcoming the North Carolina presumption of permissive use. Success on these issues, of course, will depend on the particular facts of each case. Establishing an easement by prescription, however, is burdensome, uncertain, and not judicially favored in North Carolina.[66] For these reasons this Comment does not recommend it as a judicial tool for establishing beach access in North Carolina.

B. *Implied Dedication*[67]

Dedication is the devotion of land to a public use by an "unequivocal manifestation"[68] of the fee owner that the dedication be accepted and used for such public use.[69] An implied dedication is one in which the intention to dedicate is inferred from the acts and conduct of the landowner.[70] Intent to dedicate constitutes the "offer" of dedication; "acceptance" must be demonstrated by the party seeking to establish the dedication.[71] Acceptance may be demonstrated by a formal public act or may be inferred from the conduct of a municipality or, in some cases, solely from the conduct of the public.[72] Failure to prove acceptance precludes a finding of dedication.[73]

Although the most common dedications are easements for streets, alleys, and highways, implied dedication also has been used to secure public access to beach land.[74] Continuous, uninterrupted public use of a specific beach may give

65. Petitioners' position in *Slick*, however, was especially compelling because the accessways in question provided the only available vehicular access to and from the Village of Corolla and the northern reaches of the Currituck outer banks. *Slick*, 313 N.C. at 38, 326 S.E.2d at 604. Claimants of beach accessways for public recreational use would not have so compelling a claim.

66. *See* Potts v. Burnette, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981).

67. Because it does not depend on public use, express dedication is not discussed in this Comment. An express dedication occurs when a landowner "explicitly [specifies] the interest he is dedicating." R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN *supra* note 28, § 11.6, at 753. For an example of a beach access case relying on express dedication, see Gewirtz v. City of Long Beach, 69 Misc. 2d 760, 330 N.Y.S.2d 495 (N.Y. Sup. Ct. 1972) (by opening beach to public in 1936, city expressly dedicated it), *aff'd mem.*, 45 A.D.2d 841, 358 N.Y.S.2d 957 (1974). For discussion of express dedication and beach access in North Carolina, see R. DUCKER, *supra* note 8, at 155-61.

68. 6A R. POWELL, *supra* note 10, ¶ 926(2), at 84-85.

69. *Id.* ¶ 926(1), at 83-84.

70. 4 H. TIFFANY, LAW OF REAL PROPERTY § 1101, at 574 (3d ed. 1939).

71. 6A R. POWELL, REAL PROPERTY, *supra* note 10, ¶ 926(2), at 84-85.

72. *Id.*

73. "If dedications became final by the mere act of dedication . . . several problems might arise. The interest dedicated may be unclear; so that public or private beneficiaries cannot rely on, improperly rely on or are forced to litigation in order to rely on the dedication." D. HAGMAN, URBAN PLANNING & LAND DEVELOPMENT CONTROL LAW § 140, at 260 (1975).

74. 4 H. TIFFANY, *supra* note 70, § 1098 at 562.

rise to an inference that the owner intended to open the land to the public.[75] The Texas Court of Civil Appeals first applied the implied dedication doctrine to beaches in *Seaway Co. v. Attorney General.*[76] Acting under a state statute,[77] the Texas Attorney General sought to prohibit Seaway from obstructing the dry-sand beach.[78] The court found unrestricted public recreational use of the beach for over one hundred years[79] and held that Seaway had made an implied dedication to the public.[80] Similarly, the California Supreme Court has recognized the implied dedication of beach property used by the public as a recreational area for over five years.[81]

One recurring criticism of implied dedication is its inequity to landowners.[82] Similarly situated landowners may be treated differently simply because

---

75. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (per curiam). While anyone can acquire an interest in land by adverse possession or prescription, only the public can acquire rights by dedication. *See* 4 H. TIFFANY, *supra* note 70, § 1098, at 562.

76. 375 S.W.2d 923 (Tex. Civ. App. 1964).

77. TEX. NAT. RES. CODE ANN. §§ 61.013, 61.018 (Vernon 1978). The statute makes it an offense to obstruct ingress to and egress from or use of the beach and authorizes the Attorney General to bring suit to remove any obstruction. For further discussion of the Texas statute, see *infra* notes 299-305 and accompanying text.

78. *Seaway*, 375 S.W.2d at 926. Seaway had placed barriers on the dry-sand beach.

79. *Id.* at 933-34. The court did not appear to be establishing a minimum time period in emphasizing one hundred years of use. *Compare* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 39, 465 P.2d 50, 55, 84 Cal. Rptr. 162, 167 (1970) (per curiam) (five years is minimum time period necessary to establish dedication) *with* State *ex rel.* Haman v. Fox, 100 Idaho 140, 147, 594 P.2d 1093, 1100 (1979) (five years of uninterrupted public use insufficient to imply dedication).

80. *Seaway*, 375 S.W.2d at 940. The court applied road and highway cases to the beach context in reaching its holding.

81. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 35, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970) (per curiam). In *Gion* two cases were consolidated for trial. The first case, Gion v. City of Santa Cruz, involved privately owned upland beach lots that had been used by the public as a parking, beach, and picnic area. *Id.* at 34, 465 P.2d at 53, 84 Cal. Rptr. at 165. The second case, Dietz v. King, involved a small peninsula and the access road to it. *Id.* at 36, 465 P.2d at 54, 84 Cal. Rptr. at 166. Although both areas had been used by the public for recreation for at least one hundred years, *id.*, the court stated that only five years of use would be required to establish an implied dedication. *Id.* at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168.

The landowners' intent to donate the land to public use was somewhat ambiguous. For example, in the first case, the owner occasionally posted "No Trespassing" signs. *Id.* at 34-35, 465 P.2d at 53, 84 Cal. Rptr. at 165. The owners in *Dietz* had an unlocked chain across the road and occasionally blocked access with barriers and charged an admission fee. *Id.* at 37-38, 465 P.2d at 55, 84 Cal. Rptr. at 167. The court held that although the present owners had no dedicatory intent, their predecessors in title had, by their intent, impliedly dedicated the property. *Id.* at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168.

A controversial decision, *Gion* has been the subject of much commentary. *See, e.g.*, Armstrong, Gion v. City of Santa Cruz: *Now You Own It—Now You Don't; or The Case of the Reluctant Philanthropist*, 45 L.A.B. BULL. 529 (1970); Berger, Gion v. City of Santa Cruz: *A License to Steal?*, 49 CAL. ST. B.J. 24 (1974); Berger, *Nice Guys Finish Last—At Least They Lose Their Property*: Gion v. City of Santa Cruz, 8 CAL. W.L. REV. 75 (1971) [hereinafter cited as Berger, *Nice Guys Finish Last*]; Gallagher, Jure & Agnew, *Implied Dedication: The Imaginary Waves of* Gion-Dietz, 5 SW. L. REV. 48 (1973); Shavelson, Gion v. City of Santa Cruz: *Where Do We Go From Here?*, 47 CAL. ST. B.J. 415 (1972); Comment, *A Threat to the Owners of California's Shoreline*, 11 SANTA CLARA L. REV. 327 (1971); Note, *The Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owners*, 4 LOY. L.A.L. REV. 438 (1971); Note, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 S. CAL. L. REV. 1092 (1971); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970) [hereinafter cited as Note, *Public Access to Beaches*].

82. *See* Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 UCLA L. REV. 795, 804-08 (1975). *But see* Note, *Public Access to Beaches: Common Law*

the public used one area of the beach and not another.[83] Depending on the extent of the easement, a landowner may be forced to leave all or part of the property undeveloped because development would interfere with the free exercise of the easement rights.[84] Finally, after implied dedication is found, the landowner is no longer able to convey an unencumbered title to the property.[85] Although these same inequities result under prescription, they seem especially harsh with respect to the implied dedication landowner who was, after all, the generous owner.

A second criticism of implied dedication is that it encourages landowners to take positive action to exclude the public from their land.[86] This was the ironic aftermath of *Gion v. City of Santa Cruz*.[87] Following the decision, beach property owners constructed chain link fences, dynamited beach access paths, and planted cacti to preserve their property rights.[88]

To establish an implied dedication in North Carolina, a claimant must show that the dedication was accepted in a "recognized legal manner."[89] In many jurisdictions "public user"[90]—the actual enjoyment of property—is con-

---

Doctrines and Constitutional Challenges, 48 N.Y.U.L. REV. 368, 374 (1973) ("[The] beach owner has actually lost . . . relatively little.").

83. This may not necessarily occur because one landowner intends to dedicate and the other does not. Some beach property is simply more attractive or more accessible than other property. The Oregon Supreme Court in State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), relied on the doctrine of custom rather than on implied dedication or prescription to avoid inequity.

84. The landowner's development may be able to coexist with the easement. *See, e.g.*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974) (landowner's observation tower held not to interfere in any way with public's use of beach).

85. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 28, § 8.10.

86. Such action, however, may not preclude a finding of intent to dedicate if a court finds such intent on the part of the landowner's predecessors in title. *See supra* note 81.

87. 2 Cal. 3d 29, 35, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970) (per curiam).

88. Berger, *Nice Guys Finish Last*, *supra* note 81, at 84. One commentator called on the public and on state and local governments to fight such efforts immediately. His battle plan was as follows:

> [L]awsuits should be brought now to confirm public easements wherever they have been created through past use. These easements will severely diminish the development value of beach property, since improvements that conflict with recreational use can be enjoined. Once an easement by use has been established, state or local government can assure complete public ownership by condemning the land at its reduced value. If landowner pressure inhibits governmental action, citizens' groups may bring class suits, as in *Dietz*.

Note, *Public Access to Beaches*, *supra* note 81, at 586.

A California decision following *Gion-Dietz* must have provided some comfort to concerned landowners. In County of Orange v. Chandler-Sherman Corp., 54 Cal. App. 3d 561, 126 Cal. Rptr. 765 (1976), the court stated that "so long as the property was not being damaged [by public use] and no public nuisance was being created, it was unnecessary for the owner to install chain link fences or hire armed guards to protect his beach from the onslaught of the public." *Id.* at 567, 126 Cal. Rptr. at 769. The court distinguished *Gion-Dietz*, finding the use at issue to be by smaller numbers of people for shorter periods of time, *id.* at 566-67, 126 Cal. Rptr. at 768-69, and characterizing the use as "casual," rather than "major or substantial." *Id.* at 566, 126 Cal. Rptr. at 768. Furthermore, although the owner's attempts to stop public use through sporadic use of signs and guards were not "highly efficient," the court said that because the area was largely in a natural state only a minimum effort to control public use was necessary. *Id.* at 567, 126 Cal. Rptr. at 769.

89. Emanuelson v. Gibbs, 49 N.C. App. 417, 425, 271 S.E.2d 557, 569 (1980); *accord*, Owens v. Elliott, 258 N.C. 314, 128 S.E.2d 583 (1962); Gault v. Town of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931); Wright v. Town of Lake Waccamaw, 200 N.C. 616, 158 S.E. 99 (1931).

90. "User" means "the actual exercise or enjoyment of any right [or] property." BLACK'S LAW DICTIONARY 1383 (5th ed. 1979). The term is preferred in implied dedication and prescriptive easement cases because it "conveys the idea of use that establishes a property right." Livingston,

sidered a recognized legal manner.[91] Although it is not always clear what constitutes acceptance in North Carolina, cases involving implied dedication of streets and highways suggest that public user alone is not sufficient;[92] it must be accompanied by assertion of control over the street or highway by the municipality.[93] The rationale is that because creation of a public highway imposes a maintenance duty on the public,[94] the municipal authorities, as the public's representatives, must "accept" the duty.[95]

If no duty of maintenance is imposed on the municipality, is public user

---

Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights, 24 WM. & MARY L. REV. 669, 691 n.84 (1983).

91. In the following cases public user was recognized as sufficient acceptance of an implied offer of dedication of beach property: Los Angeles County v. Berk, 26 Cal. 3d 201, 605 P.2d 381, 161 Cal. Rptr. 742, *cert. denied*, 449 U.S. 836 (1980); Long Beach v. Daugherty, 75 Cal. App. 3d 972, 142 Cal. Rptr. 593 (1977), *cert. denied*, 439 U.S. 823 (1978); Hollywood, Inc. v. Zinkil, 403 So. 2d 528 (Fla. Dist. Ct. App. 1981); Miami v. Eastern Realty Co., 202 So. 2d 760 (Fla. Dist. Ct. App. 1967), *cert. denied*, 210 So. 2d 866 (Fla. 1967); Darlington County v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977); Moody v. White, 593 S.W.2d 372 (Tex. Civ. App. 1979).

In the following cases, public user of beach property was held not to be sufficient acceptance of an implied offer of dedication: Miami Beach v. Undercliff Realty & Inv. Co., 155 Fla. 805, 21 So. 2d 783 (1945); Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 14 So. 2d 172 (1943); Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980); Department of Natural Resources v. Ocean City, 274 Md. 1, 332 A.2d 630 (1975); Department of Natural Resources v. Cropper, 274 Md. 25, 332 A.2d 644 (1975); Kempf v. Ellixson, 69 Mich. App. 339, 244 N.W.2d 476 (1976); McInnis v. Town of Hampton, 112 N.H. 57, 288 A.2d 691 (1972); Murphy v. Point Pleasant Beach, 123 N.J.L. 88, 8 A.2d 116 (1939), *aff'd* 124 N.J.L. 565, 12 A.2d 891 (1940); State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978).

Under English common law, public user alone was sufficient to constitute acceptance. *See* W. BEST, A TREATISE ON PRESUMPTIONS OF LAW AND FACT § 101 (1845).

> [T]he fact of dedication may . . . be . . . inferred from circumstances, . . . among the foremost of which is that of permissive user on the part of the public. If a man open his land so that the public pass over it continually, the public, after a user of a very few years will acquire a right of way . . . .

Id. An early Virginia case declared this rule to be inapplicable in this country. *See* Commonwealth v. Kelly, 49 Va. 700, 8 Gratt. 632 (1851). The court's reasoning was as follows:

> In England the price of land is high and owners prohibit with great care all trespasses upon it. And in that country it may be that it rarely happens that an owner permits a free passage over his land, without intending to dedicate it as a road to the public. . . . In this country the price of land is not high; nor do owners of it guard against trespasses on it with the same care; and it is known to all who have lived in the country, that until a recent period, owners frequently permitted roads to be opened through their forests and other lands not in cultivation without the least intention of dedicating these roads to the public.

Id. at 701-02, 8 Gratt. at 635. It is doubtful that this reasoning could apply in a modern beach access case given the high price of most oceanfront property.

92. In one North Carolina case, the supreme court stated that acceptance could be found "under certain circumstances, by user as of by right on the part of the public." Town of Blowing Rock v. Gregorie, 243 N.C. 364, 368, 90 S.E.2d 898, 900 (1956). Although the court's language suggests that user alone may be sufficient "under certain circumstances," the court did not rely on user alone in *Blowing Rock*. Evidence showed that the municipality had maintained and repaired the dedicated road. *Id.* at 367, 90 S.E.3d at 900.

93. *See* Owens v. Elliott, 258 N.C. 314, 128 S.E.2d 583 (1962); Rowe v. City of Durham, 235 N.C. 158, 69 S.E.2d 171 (1952); Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1951); Gault v. Town of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931); Irwin v. City of Charlotte, 193 N.C. 109, 136 S.E. 368 (1927); Emanuelson v. Gibbs, 49 N.C. App. 417, 271 S.E.2d 557 (1980).

94. *See* Owens v. Elliott, 258 N.C. 314, 128 S.E.2d 583 (1962); Emanuelson v. Gibbs, 49 N.C. App. 417, 271 S.E.2d 557 (1980).

95. One commentator suggests that the public is the municipality and the municipal authorities merely the agents of the public. Under this view, user alone should be sufficient. 11 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 33.50 (3d ed. 1949).

sufficient to establish public beach accessways in North Carolina? The courts have not ruled on this point. The issue whether public user alone is sufficient when no duty is imposed on the municipality is unlikely to arise in North Carolina with respect to roads or highways, because the existence of a road or highway[96] by definition imposes the duty.[97] If the maintenance requirement is applicable to beaches, unless a municipality has asserted some control over a beach accessway, implied dedication for public use will not be found in North Carolina. A claimant might argue that beach accessways do not impose a burden on a municipality to maintain the physical features of the accessway because coastal dynamics prevent even the landowner from maintaining the beach property in any consistent manner. When the proffered accessway is the dry-sand beach, this argument is reasonable.

In addition to the duty of physical maintenance, the municipality also is subject to tort liability for failure to maintain an accessway properly.[98] The position of the North Carolina courts appears to be that this tort liability should be assumed only by voluntary acceptance of the dedication by the proper authorities. If this is the case, public user alone should not constitute effective acceptance of an implied dedication in North Carolina.

Implied dedication is ill suited to achieve an open beach policy in North Carolina. First, it unfairly penalizes one beach property owner over another. Second, it may frustrate its own objective if formerly open beach property is closed due to landowners' reactions to court decisions. Third, public user is not sufficient evidence of acceptance.[99]

---

96. A highway includes carriageways, bridleways, and footways. Parsons v. Wright, 223 N.C. 520, 521, 27 S.E.2d 534, 536 (1943).

97. *See* Owens v. Elliott, 258 N.C. 314, 128 S.E.2d 583 (1962) (although no evidence that municipality would be liable for maintenance, court assumed such liability). Cases involving roads and highways have held that there can be no public road or highway in North Carolina unless it is (1) established by the public authorities in a proceeding regularly instituted before the proper tribunal; (2) generally used by the public and over which the proper authorities have asserted control for at least twenty years; or (3) dedicated to the public by the landowner with the sanction of the authorities and their acceptance of the responsibilities of repair and maintenance. *Id.* at 317, 128 S.E.2d at 586 (quoting Chesson v. Jordan, 224 N.C. 289, 291, 29 S.E.2d 906, 908 (1944)). *Chesson* involved prescriptive easements, not dedications. The law of prescription often appears in North Carolina dedication cases, confusing the holdings. For further discussion of these dedication cases, see Note, *Acceptance of Streets in Subdivisions—Public Use*, 41 N.C.L. REV. 875, 880-82 (1963).

Similarly, the law of dedication has been applied by some courts in prescription cases. *See* 2 AMERICAN LAW OF PROPERTY, *supra* note 32, § 9.50, at 485. These courts have required acts of acceptance by public authorities before the public can claim a prescriptive easement. *Id.* Most courts, however, have not required such acceptance, and indeed "there is no sound basis for such a requirement in order to [find a public easement] . . . by prescription." *Id.*

98. *See* Note, *supra* note 97, at 879. This conclusion is supported by present regulations under the North Carolina Coastal and Estuarine Water Beach Access Program, N.C. GEN. STAT. §§ 113A-134.1 to -134.3 (1983). The North Carolina Coastal Resources Commission Regulations provide that "[m]aintenance is the proper upkeep and repair of beach access sites and their facilities in such a manner that *public health and safety is ensured.*" N.C. Coastal Resources Comm'n Reg., 15 N.C. ADMIN. CODE 7M.0302(i) (1985) (emphasis added). Another regulation makes clear that this is a local responsibility: "Maintenance is to be a responsibility of the local government unless another suitable party is identified." *Id.* For further discussion of the North Carolina legislation, see *infra* notes 317-32 and accompanying text.

99. Implied dedication also has been criticized as a taking without just compensation in violation of the fifth amendment of the United States Constitution. *See* Berger, *Nice Guys Finish Last*, *supra* note 81, at 93-95. For a discussion of taking, see *infra* notes 205-37 and accompanying text.

C. *Custom*

A right to make use of land belonging to another may be acquired by "customary use."[100] For example, "it may be a custom for fishermen to dry nets on certain land,"[101] or for citizens of a town to use a particular piece of land for recreation.[102] The custom doctrine developed in England where the practice of a particular locality, although not written into common law, could become the law of that place.[103] To achieve the status of law, the custom " 'must have continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the persons; and it must be certain and reasonable as to the subject matter or rights created.' "[104]

Several American jurisdictions have recognized customary use,[105] and two, Oregon[106] and Hawaii,[107] have used it to establish public access rights in beach property. In *State ex rel. Thornton v. Hay*[108] the Supreme Court of Oregon used custom to establish a public recreational easement in private beach lands.[109] When a motel owner, William Hay, used logs to enclose his dry-sand beach for the exclusive use of his guests, he was criticized by politicians, citizens' groups and newspapers.[110] Hay responded to the criticism by building a more permanent fence; after a winter storm destroyed it, he built another.[111] The State of

100. 3 H. TIFFANY, *supra* note 70, § 935, at 623.

101. *Id.*

102. *Id.*

103. *See* Graham v. Walker, 78 Conn. 130, 132-33, 61 A. 98, 99 (1905). The theory was that if there had been usage of a right of way from time immemorial it must have arisen from an act of Parliament or other public act of which the written record had disappeared. *Id.* This theory is similar to the prescription theory of the lost grant. *See supra* text accompanying note 26. To be immemorial the custom must have been exercised since "a time where of the memory of a man runneth not to the contrary." 12 HALSBURY'S LAWS OF ENGLAND, CUSTOM AND USAGE 5 (1975). This requirement was construed to mean from the coronation of Richard I in 1189. *Graham*, 78 Conn. at 131, 61 A. at 99.

104. 3 H. TIFFANY, *supra* note 70, § 935, at 623 (quoting S. LEAKE, A DIGEST OF THE LAW OF USES AND PROFITS OF LAND 552 (1888)). This language, quoted often in custom cases, *see, e.g.*, State *ex rel.* Thornton v. Hay, 254 Or. 584, 595-97, 462 P.2d 671, 677 (1969), apparently originated in The Case of Tanistry, Dav. 23, 31-32, 80 Eng. Rep. 516, 519-20 (K.B. 1674).

105. *See, e.g.*, United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769, 772-73 (D.V.I. 1974), *aff'd*, 429 F.2d 513 (3d Cir. 1975); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974); County of Hawaii v. Sotomura, 55 Hawaii 176, 181-82, 517 P.2d 57, 61 (1973), *cert. denied*, 419 U.S. 872 (1974); State *ex rel.* Thornton v. Hay, 254 Or. 584, 595, 462 P.2d 671, 676 (1969); Moody v. White, 593 S.W.2d 372, 379 (Tex. Civ. App. 1979).

106. State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969).

107. *In re* Application of Ashford, 50 Hawaii 314, 440 P.2d 76 (1968) (Hawaii Supreme Court used custom to hold that upland land grants extended only to vegetation line.). *But see* Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) (holding that the result in *Ashford* as to grants registered in the land court constituted an unconstitutional taking without compensation, thereby effectively limiting the *Ashford* holding to land grants not registered in the land court).

108. 254 Or. 584, 462 P.2d 671 (1969).

109. For the background of the case see Note, *The English Doctrine of Custom in Oregon Property Law*: State *ex rel.* Thornton v. Hay, 4 ENVTL. L. 383, 384-88 (1974); *see also* McLennan, *Public Patrimony: An Appraisal of Legislation and Common Law Protecting Recreational Values in Oregon's State-Owned Lands and Waters*, 4 ENVTL. L. 317, 356-64 (1974) (surveys Oregon statutes and case law that relate to public recreational lands).

110. Note, *supra* note 109, at 385.

111. *Id.* at 386.

Oregon, under the authority of the Oregon Beach Bill,[112] sought an order for removal of Hay's fence.[113] In granting the order, the court noted that although elements of prescription were present, the "most cogent basis" for the decision was custom.[114] The requirements of customary use[115] were met by public use of the beach for recreational purposes "running back in time as long as the land has been inhabited."[116] Evidence of continous use was inherent in the fact that the beach was suitable for little else but recreational use.[117]

The reliance in *Thornton* on custom instead of prescription or implied dedication was dictated primarily by the Oregon court's belief that custom could be applied to all privately owned beaches, not just the disputed tract.[118] The court's establishment of public rights of access beyond the disputed area, however, was an expansion of the English doctrine, which limited the application of a custom to the inhabitants of a particular locality.[119]

Thornton is unusual in its use of custom to establish beach access. Most American jurisdictions have refused to recognize customary rights in beach property[120] or in any other property.[121] North Carolina has not expressly ruled

112. OR. REV. STAT. § 390.610 (1983). This bill had languished in committee prior to the controversy over Hay's fence. McLennan, *supra* note 109, at 356. The ensuing publicity and public outrage prompted passage of the bill, and the state promptly commenced suit against Hay. *Id.* at 357-58. The statute provides that when "use has been legally sufficient to create rights or easements in the public . . . all public rights or easements . . . are confirmed and declared vested exclusively in the State of Oregon . . . ." OR. REV. STAT. § 390.610(2), (3) (1983). The Department of Transportation and the State Land Board are directed to initiate civil suits to protect such interests. *Id.* § 390.620(1).

The constitutionality of the Oregon Beach Bill was tested in Hay v. Bruno, 344 F. Supp. 286 (D. Or. 1972). The United States District Court for the District of Oregon held that the bill was constitutional and violated no rights of the landowner because he knew his land was used extensively by the public for vehicular traffic and recreational purposes. *Id.* at 289.

113. Note, *supra* note 109, at 386.

114. *Thornton*, 254 Or. at 595, 462 P.2d at 676.

115. Seven requirements must be met to establish a custom: the use must be (1) ancient, (2) continuous, (3) peaceable and free from dispute, and (4) reasonable; (5) the area of use must be certain; (6) the landowner must be obliged to permit the use; and (7) the use must be consistent with other law. 1 W. BLACKSTONE, COMMENTARIES *75-*78. For detailed discussions of these requirements, see 12 HALSBURY'S LAWS OF ENGLAND, CUSTOM AND USAGE §§ 406-19 (4th ed. 1975); Note, *supra* note 109, at 395-410. One commentator has concluded that the *Thornton* court had modified Blackstone's requirements of certainty and consistency, thereby raising significant logical and constitutional problems. *Id.* at 384, 399-406.

116. *Thornton*, 254 Or. at 595, 462 P.2d at 677.

117. "[T]he public has always made use of the land in a manner appropriate to the land . . . . [T]he character of the land . . . limits the use thereof to recreational uses connected with the foreshore." *Id.* at 596, 462 P.2d at 677.

118. "An established custom . . . can be proved with reference to a larger region." *Id.* at 595, 462 P.2d at 676. One commentator has suggested that the doctrine be used to establish statewide rights of public access. *See* Comment, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586, 590-92 (1973).

119. *See* Graham v. Walker, 78 Conn. 130, 132, 61 A. 98, 99 (1905); 1 W. BLACKSTONE, *supra* note 115, at *74. The Oregon court recognized that it was extending the traditional rule, but concluded that "a custom, established in fact, can have regional application and be enjoyed by a larger public than the inhabitants of a single village." *Thornton*, 254 Or. at 591 n.8, 462 P.2d at 678 n.8.

120. *See, e.g.*, Smith v. Bruce, 241 Ga. 133, 146, 244 S.E.2d 559, 569 (1978); Department of Natural Resources v. Mayor of Ocean City, 274 Md. 1, 12-14, 332 A.2d 630, 637-38 (1975); Gillies v. Orienta Beach Club, 159 Misc. 675, 289 N.Y.S. 733 (N.Y. Sup. Ct. 1935), *aff'd*, 248 A.D. 623, 288 N.Y.S. 136 (1936). Oregon has refused to recognize customary rights above the dry-sand area. *See* State Hwy. Comm'n v. Bauman, 16 Or. 275, 517 P.2d 1202 (1974).

on custom, but, given the doctrine's rejection elsewhere, North Carolina courts are unlikely to accept it. Thus, the practical value of custom in the implementation of an open beach policy is limited. The theory of customary use, however, is instructive in formulating such a policy because it emphasizes the unique nature of beach land.[122] Under prescription and implied dedication, the nature of the use establishes and defines the public right.[123] Custom, however, regards the use as derivative of the land; the nature of the land, not the nature of the use, defines the public right.[124] Likewise, an open beach policy for North Carolina should be "alleged in the land" and "not in the person."[125] Custom, however, is not the best approach for guaranteeing public access to North Carolina beaches. The public trust doctrine—the judicial approach suggested by this Comment—incorporates the "alleged in the land" concept but, unlike custom, is judicially favored by North Carolina courts, is not traditionally confined to a local area, and historically is tied to beach areas.

III. THE PUBLIC TRUST DOCTRINE AND PUBLIC ACCESS: A JUDICIAL TOOL FOR NORTH CAROLINA

A. *The Public Trust Doctrine*

The final common-law tool for providing beach access is also the oldest.

---

121. *See, e.g.*, Graham v. Walker, 78 Conn. 130, 61 A. 98 (1905); Attorney Gen. v. Tarr, 148 Mass. 309, 19 N.E. 358 (1889); Harris v. Carson, 34 Va. 748, 7 Leigh 632 (1836). Some of these jurisdictions have held that because it is literally impossible for an American custom to have existed since time immemorial (before the coronation of Richard I in 1189), the doctrine of custom is inapplicable in America. *See, e.g.*, Delaplane v. Crenshaw & Fisher, 56 Va. 880, 14 Gratt. 457 (1860). One solution to this problem is the approach taken by the English court in Leuckhart v. Cooper, 7 Car. & P. 119, 173 Eng. Rep. 53 (K.B. 1835). The court stated that "[t]he general law as to a custom is, that, if you shew its existence at a distant time, and there is no evidence given that, at a certain time, it did not exist; you may infer that it went back as far as the reign of Richard the First, which is the time of legal memory." *Id.* at 126, 173 Eng. Rep. at 56.

Other American jurisdictions have held that custom is an obsolete doctrine because methods exist for recording rights in land. *See, e.g.*, Gillies v. Orienta Beach Club, 159 Misc. 675, 681, 289 N.Y.S. 733, 739-40 (N.Y. Sup. Ct. 1935), *aff'd*, 248 A.D. 623, 288 N.Y.S. 136 (1936). Custom also has been said to violate the rule against perpetuities. *See* J. GRAY, THE RULE AGAINST PERPETUITIES § 586 (4th ed. 1942).

In Albright v. Cortright, 64 N.J.L. 330, 45 A. 634 (1900), a New Jersey court held that rights of use in the public could not be established by custom because a "custom so general would be indistinguishable from the law itself." *Id.* at 333, 45 A. at 635. The New Jersey Supreme Court has called custom an "[a]rchaic judicial [response] . . . to modern social problems." Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 325, 471 A.2d 355, 365 (1984).

122. *See supra* note 117.

123. Under prescription, if the use is sufficiently adverse to the landowner, a public right of use is established. *See supra* notes 28-32 and accompanying text. Under dedication, if the use is allowed by the landowner, a public right of use is established. *See supra* note 91 and accompanying text.

124. *See* Graham v. Walker, 78 Conn. 130, 132, 61 A. 98, 99 (1905) ("A right of way by custom appertains to a certain district or territory . . . . It belongs to the inhabitants of that territory, whether landowners or not.").

125. In Gateward's Case, 3 Co. Rep. 374, 376, 77 Eng. Rep. 344, 345 (K.B. 1607), the court explained the main difference between custom and prescription: "[A] difference was taken, and agreed, between a prescription which always is alleged in the person, and a custom, which always ought to be alleged in the land . . . ."; *see also* E. BURN, CHESHIRE'S MODERN LAW OF REAL PROPERTY 544 (13th ed. 1982) ("[P]rescription always connects the right with a definite person, custom connects it with some particular locality.").

The public trust doctrine developed from Roman[126] and English law,[127] becoming a part of American law during the Revolution.[128] Public trust theory holds that the "public [has] certain important rights in the foreshore [which supersede] any conflicting rights, including those claimed by the [sovereign]."[129] The doctrine presumes title to the foreshore to be in the sovereign unless expressly granted to the littoral owner. This title, however, is subject to the public's right of use for fishing, navigation, and swimming.[130] Thus, the sovereign holds the lands in *jus publicum*, in trust for the common use and benefit of the public.[131]

The seminal case of *Illinois Central Railroad v. Illinois*[132] established the foundation for the modern development of the public trust doctrine in the United States. In 1869 the Illinois legislature granted one thousand acres of tidelands in Lake Michigan to a railroad company. The legislature later revoked the grant, and the railroad challenged the revocation.[133] The Supreme Court ruled that the grant was revocable because title to the shorelands was held in trust for the people of the State. The Court noted:

> The trust developing upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[134]

The Court also articulated a "model for judicial skepticism"[135] to scrutinize legislative attempts to terminate public trust interests through conveyances

---

126. Roman jurisprudence held that "[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea." THE INSTITUTES OF JUSTINIAN 2.1.1 (1870). The shores of the sea extended "to the limit reached by the greatest winter flood." *Id.* at 2.1.3.

127. For a discussion of the English common-law theory of *jus publicum*, see Shively v. Bowlby, 152 U.S. 1 (1894):

> In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, . . . below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing.

Id. at 13; *see also* Arnold v. Mundy, 6 N.J.L. 1 (1821) (discussing history of public trust in England).

128. *See, e.g.* Arnold v. Mundy, 6 N.J.L. 1, 13 (1821) ("[U]pon the Revolution, all of the royal rights [in the foreshore] vested in the people of New Jersey, as the sovereign of the country . . . .").

129. Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

130. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410 (1842); *see* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-89 (1970); Comment, *supra* note 129, at 776-87. See *infra* notes 150-58 and accompanying text for a discussion of the expansion of the doctrine to include other public uses.

131. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410-11 (1842).

132. 146 U.S. 387 (1892).

133. *Id.* at 394-414.

134. *Id.* at 453. The holding does not prohibit all sales of trust lands to private parties. It only precludes disposition of the government's authority to govern the lands.

135. Sax, *supra* note 130, at 491. The model "poses a set of relevant standards for current, less dramatic instances of dubious governmental conduct." *Id.*

to private individuals.[136] Finally, the Court extended the public trust doctrine beyond its common-law limitation to ocean waters to include the land under the navigable waters of the Great Lakes.[137]

Not all jurisdictions apply the public trust doctrine to the foreshore. These states fix the boundary of private property at the low-tide mark[138] and vest title to the foreshore in the littoral owner.[139] North Carolina, however, is a "high-tide" state,[140] holding that private property ends at the high-tide line and that the foreshore is the property of the state.[141]

North Carolina accepted the public trust doctrine in *Shepard's Point Land Co. v. Atlantic Hotel*,[142] in which the Supreme Court of North Carolina quoted the decision in *Illinois Central* with approval.[143] Plaintiff in *Shepard's Point* brought a replevin action for recovery of oceanfront property granted to him by the State upon which defendant had erected walks, wharves, and a pavilion.[144] Defendant claimed that because the property was the foreshore, plaintiff had never owned it and defendant, owner of the adjacent upland property, had an easement right of a riparian owner to erect wharves, walks, and a pavilion.[145] The court agreed with defendant and held that any grant to plaintiff by the State was legally ineffective to dispose of public trust property. Thus, plaintiff had no ownership claim to the foreshore and could assert no right of title against defendant.[146] Although the public trust doctrine has received rather confused treatment in the North Carolina courts,[147] case law supports the conclusion that a public trust easement burdens both state and privately owned trust lands.[148]

---

136. *Id.* Professor Sax suggests that the model would extend to less egregicus government actions that interfere with public rights in trust property, such as the building of seawalls or other obstructions.

137. *Illinois Central*, 146 U.S. at 455.

138. Such states are called "low-tide" states. The low-tide states are Connecticut, Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania, and Virginia. *See* 1 WATER AND WATER RIGHTS § 36.3(C) (R. Clark ed. 1967).

139. *Id*; *see, e.g.*, *In re* Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974) (colonial ordinance vested title to the foreshore in littoral owner).

140. *See* Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970). Other high-tide states are Alabama, Alaska, California, Florida, Georgia, Hawaii, Louisiana, Maryland, Mississippi, New Jersey, New York, Oregon, Rhode Island, South Carolina, Texas, and Washington. *See* 1 R. POWELL, *supra* note 10, ¶ 163, at 698 n.13.

For a discussion of the public trust doctrine in North Carolina, see Comment, *Defining Navigable Waters and the Application of the Public Trust Doctrine in North Carolina*, 49 N.C.L. REV. 888 (1971).

141. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970). Prior to *Carolina Beach* there was much confusion as to whether North Carolina was a low- or high-tide state. *See* Comment, *supra* note 140, at 892. The confusion resulted from the tests for title employed by the North Carolina courts to determine the inland line of state ownership. *See* Schoenbaum, *supra* note 8, at 8-12.

142. 132 N.C. 517, 44 S.E. 39 (1903).

143. *Id.* at 525-28, 44 S.E. at 41-42.

144. *Id.* at 517-18, 44 S.E. at 39.

145. *Id.* at 518, 538, 44 S.E. at 39, 44.

146. *Id.* at 541, 44 S.E. at 47. By statute, "[n]o submerged lands may be conveyed in fee, but easements therein may be granted." N.C. GEN. STAT. § 146-3(1) (1983). Submerged lands include the foreshore. *See* Schoenbaum, *supra* note 8, at 4-7.

147. *See* Schoenbaum, *supra* note 8, at 8-12.

148. *See id.* at 17.

B. *Scope of the Public Trust Doctrine: What is a Public Trust Use?*

The public trust doctrine protects certain uses from interference by private individuals or the government. Public trust uses traditionally were defined in terms of navigation, commerce, and fishing.[149] American courts, however, have expanded the scope of trust uses to include swimming, sunbathing, hunting, camping, and other shore-related recreational activities.[150] The California Supreme Court in *Marks v. Whitney*[151] added ecological preservation to the list of public trust uses, noting that the state "is not burdened with an outmoded classification favoring one mode of utilization over another . . . ."[152] Similar reasoning was used by the New Jersey Supreme Court in holding that the public trust doctrine dictates that public beaches be open to all without discrimination:

> We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should be molded and extended to meet changing conditions and needs of the public it was created to benefit.[153]

The public trust doctrine developed in England at a time when fishing and commerce were becoming increasingly important. The New Jersey Supreme Court and others have recognized the importance of shore-related recreational activities and the corollary need for expansion of the doctrine to include such activities.[154]

Although the North Carolina courts have not explicitly expanded public trust uses beyond navigation, bathing, and fishing, a federal court interpreting North Carolina law has found hunting to be a proper use of public trust land.[155]

---

149. Comment, *supra* note 129, at 775.

150. *See, e.g.*, Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972) (public rights include bathing, swimming, and other shore activities); Diana Shooting Club v. Husting, 756 Wis. 261, 145 N.W. 816 (1914) (public rights include hunting); *see also* Comment, *supra* note 129, at 781-87 (catalogue of public rights).

151. 6 Cal. 3d 251, 491 P.2d 375, 98 Cal. Rptr. 790 (1971). The *Marks* decision is discussed in Comment, *Expanding the Definition of Public Trust Uses*, 51 N.C.L. REV. 316 (1972).

152. *Marks*, 6 Cal.3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 786.

153. Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972).

154. *Id.*; *see also* 1 WATER AND WATER RIGHTS, *supra* note 138, § 36.4(B), at 202:

> The principle that the public has an interest in tidelands and a right to use them for purposes for which there is a substantial public demand may be derived from the fact that the public won a right to passage over the shore for access to the sea for fishing when this was the area of substantial public demand.

155. *See* Swan Island Club v. White, 114 F. Supp. 95 (E.D.N.C. 1953), *aff'd sub nom.* Swan Island Club v. Yarborough, 209 F.2d 698 (4th Cir. 1954). *Swan Island* was an action brought to enjoin duck hunters from trespassing upon submerged waters in Currituck Sound. *Id.* at 97. Plaintiff claimed title to the lands under state land grants. *Id.* at 99. The court found that the lands were impressed with a public trust, *id.* at 100-01, and therefore the state had no authority to grant them to plaintiff. *Id.* at 100. Because plaintiff had no title, it was not necessary for the court to decide whether defendants had an easement right to hunt on the property. *Id.* at 103. In dicta, however, the court declared that "the public has the right to use navigable waters over privately owned bottoms for the purpose of navigation and that this right includes the right to hunt and take wild game." *Id.* The court noted that North Carolina had "not decided the question of the extent of the

Furthermore, North Carolina decisions consistently have used general language in declaring that the foreshore "is reserved for the use of the public."[156] In *State v. Baum*[157] the North Carolina Supreme Court stated that the "public [has] the right to the unobstructed navigation [of public trust lands] as a public highway for *all purposes of pleasure or profit.*"[158] This language suggests that the courts would be willing to extend the scope of the doctrine to include recreational uses. The issue simply has never been raised in North Carolina.

C. *Scope of the Public Trust Doctrine: Expansion to the Dry-Sand Beach*

1. Tests for Determining Public Trust Lands

As developed in England, the public trust doctrine applied only to lands over which the tide ebbed and flowed.[159] The United States Supreme Court has modified and extended the doctrine to include other lands. In *Martin v. Waddell's Lessee*[160] the Court adopted the concept of "navigability" to determine public trust lands.[161] Originally, this concept merely restated the ebb-and-flow test.[162] Subsequent decisions, however, rejected the ebb-and-flow test for inland, nontidal waters and held all federal lands under navigable-in-fact waters to be impressed with the public trust.[163] Most states similarly apply the navigable-in-fact test to determine which state lands are public trust lands.[164] The North

---

right of the public to use the navigable waters," but stated that it "[felt] free to accept the . . . reasonable and appropriate [rule] for North Carolina in the light of North Carolina decisions." *Id.*

In affirming the decision, the United States Court of Appeals for the Fourth Circuit stated that the trial court's holding that the lands "would be subject to the same trust in behalf of the public that would affect them if title were held by the state" was "the logical application of the trust doctrine . . . in North Carolina." Swan Island Club v. Yarborough, 209 F.2d 698, 702 (4th Cir. 1954). The appellate court, however, stopped short of affirming the trial court's expansion in dicta regarding the public trust doctrine.

156. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 299, 177 S.E.2d 513, 515 (1970); *see also* State v. Twiford, 136 N.C. 603, 609, 48 S.E. 586, 588 (1904) (Public trust lands are "reserved for free and unrestricted use by the public.").

157. 128 N.C. 600, 38 S.E. 900 (1904).

158. *Id.* at 604, 38 S.E. at 901 (emphasis added).

159. *See* Hannig, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test*, 23 SANTA CLARA L. REV. 211, 224 (1983); Schoenbaum, *supra* note 8, at 5.

160. 41 U.S. (16 Pet.) 367 (1842).

161. *Id.* at 410.

162. Schoenbaum, *supra* note 8, at 6.

163. *Id.*

164. *See* J. WEBSTER, *supra* note 29, § 350, at 369. The federal test of navigability-in-fact was stated in The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870). Lands "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.* at 563. States, however, may adopt "different and less stringent tests of navigability" to determine the extent of public use of waterways. Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 567-68, 127 Cal. Rptr. 830, 834 (1976); *see also* Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 655 (1927) ("[The] nature and extent of the rights of the state . . . in navigable waters within the state . . . are matters of state law to be determined by the statutes and judicial decisions of the state."). Many states have adopted tests different from the federal standard. Michigan, for example, uses a "log-flotation test." Bott v. Natural Resources Comm'n, 415 Mich. 45, 62, 327 N.W.2d 838, 841-42 (1982). Under that test, a waterway is navigable if it is large enough to float logs. *Id.* Courts in California, Idaho, Oregon, Wisconsin, and Wyoming have developed a recreational boating test, which holds that waters "capable of being navigated by oar or motor propelled small craft" are navigable-in-fact. People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1050,

Carolina courts have used both the ebb-and-flow test and the navigable-in-fact test to determine public trust lands.[165] Nonetheless, language used by the courts indicates that public trust lands in North Carolina are those covered by waters that actually are navigable for sea vessels,[166] or that are navigable by vessels or boats "such as are employed in the ordinary course of water commerce, trade, and travel."[167] For tidelands, the ebb-and-flow test still applies, granting the state ownership to the mean high-tide line.[168]

2. Judicial Expansion of the Public Trust Doctrine to Include the Dry-Sand Beach

As currently applied, the public trust doctrine includes the foreshore, the area that is "daily covered and uncovered" by the "ordinary ebb and flow of normal tides."[169] The question arises whether the public trust doctrine can be extended to include the dry-sand beach that is only occasionally covered by the tides.[170] Attempts to expand the doctrine to include the dry-sand area were rejected at common law[171] and have been rejected by most American jurisdictions.[172] A 1984 New Jersey Supreme Court decision, however, held that the

---

97 Cal. Rptr. 448, 454 (1971); *see Hitchings*, 55 Cal. App. 3d at 560, 127 Cal. Rptr. at 830 (1976) (applying recreational boating test); Southern Idaho Fish & Game Ass'n v. Dicabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974) (Idaho courts use log-flotation test and recreational boating test to determine navigability); Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 163 N.E.2d 373 (1959) (Ohio uses recreational boating test); Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952) (Wisconsin uses recreational boating test); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961) (Wyoming uses recreational boating test). One commentator has noted that the recreational boating test "takes advantage of the freedom of individual states to adopt principles of navigability and jurisdiction over navigable waters that are consistent with their own needs and desires." Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 U.C.D. L. REV. 579, 626 & n.215 (1982).

165. *See* Schoenbaum, *supra* note 8, at 11-15. In an early case, State v. Dibble, 49 N.C. (4 Jones) 107 (1856), the North Carolina Supreme Court rejected the ebb-and-flow test, declaring that test to be "entirely inapplicable to our situation." *Id.* at 110. *Dibble*, however, involved only nontidal waters, and the holding is properly limited to those waters. *See* State v. Glen, 52 N.C. (7 Jones) 321, 325 (1859) ("We hold, that any waters, whether *sounds, bays, rivers or creeks*, which are wide enough and deep enough for the navigation of sea vessels, are navigable waters [and are] open and common to all the citizens of the state . . . .") (emphasis added). In Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970), the supreme court noted that the North Carolina "position [on the dividing line between state and private property] is somewhat obscured by the vagaries of ancient cases." *Id.* at 302, 177 S.E.2d at 516. North Carolina is not alone in its obfuscation of the law of navigability. As one commentator has noted, "the concept is a slippery one . . . . To appreciate [the] schizoid nature of the law . . . one need venture no further than the decisions of the United States Supreme Court." Frank, *supra* note 164, at 582.

166. *See* Resort Dev. Co. v. Parmele, 235 N.C. 689, 695, 71 S.E.2d 474, 479 (1952) (citing Collins v. Benbury, 25 N.C. (3 Ired.) 277, 282 (1842), *aff'd on reh'g per curiam*, 27 N.C. (5 Ired.) 118 (1844)).

167. Parmele v. Eaton, 240 N.C. 539, 548, 83 S.E.2d 93, 99 (1954).

168. Schoenbaum, *supra* note 8, at 7.

169. BLACK'S LAW DICTIONARY 1329 (5th ed. 1979).

170. Roman law included the area up to the highest storm lines. *See supra* note 126. This definition probably would include the dry-sand area.

171. In Attorney Gen. v. Chambers, 4 De. G.M. & G. 206, 43 Eng. Rep. 486 (1854), Lord Chancellor Cranworth, after carefully researching this "very obscure question," concluded that the Crown's right to the seashore was limited to lands that "for the most part [are not] dry or manorable." *Id.* at 218, 43 Eng. Rep. at 490.

172. The United States Supreme Court has held that the tidelands extend only so far as the land " 'between ordinary high and low-water mark, the land over which the daily tides ebb and flow.' "

public trust warranted public use of the dry-sand area "subject to an accommodation of the interests of the owner."[173] In a prior decision, that court had suggested in dicta that the public, in exercising its public trust rights, might be entitled to infringe upon the private dry-sand beaches adjacent to the foreshore.[174] The case of *Matthews v. Bay Head Improvement Association*[175] presented the question directly to the court.

In *Matthews* defendant, a nonprofit corporation, owned and leased certain oceanfront properties in the Borough of Bay Head for the use of its members.[176] Except for fishermen, who were allowed to use the dry-sand to access the foreshore, only Association members were allowed to use the beach between 10:00 a.m. and 5:30 p.m. during the summer.[177] Plaintiffs, residents of a neighboring borough, joined with the public advocate[178] and asserted that defendants had denied the general public its right of access to public trust lands.[179]

The court first noted the general acceptance of the public trust doctrine in New Jersey.[180] It then reviewed its prior findings of public rights in dry-sand beach areas owned by a municipality.[181] Finally, the court addressed the extent

---

Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, 22-23 (1935) (quoting United States v. Pacheco, 69 U.S. (2 Wall.) 587, 590 (1864)).

173. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 325, 471 A.2d 355, 365, *cert. denied*, 105 S. Ct. 93 (1984). A dissenting justice in State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) argued that the court should have expanded the public trust doctrine to include the dry-sand beach rather than apply custom to create a public right of access. *Id.*, at 601-02, 462 P.2d at 679 (Denecke, J., dissenting). By expanding the doctrine only insofar as public use is concerned, the New Jersey court in *Matthews* avoided the problem encountered in Hughes v. State, 67 Wash. 2d 799, 410 P.2d 20 (1966), *rev'd sub nom.* Hughes v. Washington, 389 U.S. 290 (1967). In *Hughes* the Washington Supreme Court held that the landward boundary of the wet-sand area was the vegetation line and that state ownership extended to that line. *Id.* at 811, 816, 410 P.2d at 27, 29. The United States Supreme Court, however, reversed the decision, finding that state ownership extended only to the mean high-tide line. Hughes v. Washington, 389 U.S. 290 (1967). Citing its decision in Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10 (1935), the Court stated that the question of ownership of the tidelands is a federal question. *Hughes*, 389 U.S. at 292-93. To avoid reversal on federal question grounds, a court following the *Matthews* rationale should limit its decision to the issue of rights and interests of the public in the dry-sand area and not assert state ownership of this area. *See also* Schoenbaum, *supra* note 8, at 7 ("Although federal law determines the extent of the submerged lands each state acquired upon its admission to the Union, the subsequent disposition of such lands is a matter of state law."). The *Matthews* rationale, however, still may be challenged as a taking of private property in violation of the United States Constituion. *See infra* note 206. *But see* Comment, *The Public May Have a Right to Use Privately Owned Beaches For Recreation But the Extent of Any Such Right Will Be Determined With a Location by Location Test*: Matthews v. Bay Head Improvement Ass'n, 15 RUTGERS L.J. 813, 826 (1985) (decision in *Matthews* was not an unconstitutional taking).

174. Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 308-09, 294 A.2d 47, 54 (1972).

175. 95 N.J. 306, 471 A.2d 355, *cert. denied*, 105 S.Ct. 93 (1984). For background and discussion of this case, see Comment, *supra* note 173.

176. *Matthews*, 95 N.J. at 314, 471 A.2d at 359. Membership was limited to residents of the Borough of Bay Head. *Id.* at 315, 471 A.2d at 359.

177. *Id.* The public was allowed to use the beach from 5:30 p.m. to 10:00 a.m. during the summer. There were no hourly restrictions between Labor Day and mid-June. *Id.*

178. The public advocate is a "statutorily created ombudsman with broad powers to institute and prosecute public interest litigation." Weigel, *Opening Up Private Beach Through 'Public Trust' Doctrine*, 63 TITLE NEWS, May 1984, at 6, 8.

179. *Matthews*, 95 N.J. at 312-13, 471 A.2d at 358.

180. *Id.* at 316-17, 471 A.2d at 360.

181. *Id.* at 321-22, 471 A.2d at 363. In Borough of Neptune City v. Borough of Avon-by-the-

of the public's interest in privately owned dry-sand beaches. Two interests were recognized by the court: (1) the right to cross the dry sand in order to gain access to the foreshore, and (2) the right to sunbathe and use the beach for general recreational activities.[182] The court held that rights in the dry-sand area under the public trust doctrine included both the right of passage and the right of recreational use[183] and concluded that the Association must open its beaches to the general public.[184]

> The bather's right in the upland[185] sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. . . . The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean.[186]

The court limited its holding to those beaches where circumstances reasonably necessitate use of the dry-sand area for enjoyment of the ocean.[187] Perhaps the

---

Sea, 61 N.J. 296, 294 A.2d 47 (1972), the New Jersey Supreme Court held that a municipally owned dry-sand beach dedicated to the public must be open to all members of the public. *Id.* at 309, 294 A.2d at 54. The court said that the public trust doctrine "dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible." *Id.* Thus, the Borough of Avon-by-the-Sea could not prohibit use of the beach by nonresidents.

In Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978), the supreme court held that the public's right to use municipally owned beaches was not dependent upon dedication for use by the general public. *Id.* at 179-80, 393 A.2d at 573. The Borough of Deal, perhaps in light of the *Neptune City* decision, had dedicated the beach for use by its residents only. *Id.* at 176, 393 A.2d at 572. Such limited dedication, the court said, was "immaterial" because the public trust requires that the public be given a right to use all dry-sand beaches owned by a municipality. *Id.* at 179-80, 393 A.2d at 573.

182. *Matthews*, 95 N.J. at 323, 471 A.2d at 364.

183. *Id.* at 325, 471 A.2d at 365.

184. *Id.* at 331-32, 471 A.2d at 368-69. Two factors were of particular importance to the court. First, the court found that "[w]hen viewed in its totality—its purposes, relationship with the municipality, communal characteristics, activities, and virtual monopoly over the Bay Head beachfront—the quasi-public nature of the Association is apparent." *Id.* at 330, 471 A.2d at 368. Second, the court noted that there was no public beach in the Borough of Bay Head. "If the residents of every municipality bordering the Jersey shore were to adopt the Bay Head policy, the public would be prevented from exercising its right to enjoy the foreshore. The Bay Head Residents may not frustrate the public's right [under the public trust doctrine] in this manner." *Id.* at 331, 471 A.2d at 368. Although concluding that the public's rights in private beaches "are not co-extensive with the rights enjoyed in municipal beaches," the court stated that "private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine." *Matthews*, 95 N.J. at 326, 471 A.2d at 366.

185. The court used the term "upland" to refer to the dry-sand area, not property landward of the vegetation line.

186. *Matthews*, 95 N.J. at 316, 471 A.2d at 365.

187. *Id.* According to the court, circumstances to be considered included location of the "dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner." *Id.* The court emphasized that the public's right of access under the public trust doctrine "does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea." *Id.* at 324, 471 A.2d at 364.

Although the public advocate in *Matthews* urged that all privately owned beachfront property be opened to the public, the court found that "[n]othing has been developed on this record to justify

most significant aspect of the *Matthews* decision was the court's rejection of prescription, dedication, and custom as alternatives to the public trust doctrine.[188] "Archaic judicial responses," the court said, "are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.' "[189]

The court in *Matthews* established the public trust doctrine as the only legal concept with sufficient "breadth and substantive content" to make it a useful tool for beach access.[190] The underlying principle—that the unique nature of tidelands imposes upon them a public trust—is easily applicable to beaches; indeed, court decisions relying on dedication, custom, and prescription have assumed public recreational use to be inherent in beach land.[191]

The *Matthews* decision illustrates that the public trust doctrine can embrace the dry-sand areas adjacent to the foreshore, even though these areas are not within the traditionally defined scope of the public trust doctrine. Furthermore, the decision exemplifies an active judicial role in interpreting public policy with respect to the beaches. Professor Sax notes that the "fundamental function of courts in the public trust area is one of democratization."[192] In this function, the courts promote "equality of political power for a disorganized and diffuse majority,"[193] the public. The judiciary, however, has been "both misunderstood and underrated as a resource for dealing with [natural] resources."[194] The North Carolina courts have shown insight and sensitivity to many of the problems of resource management, particularly in the coastal area.[195] For these

---

[the position of the public advocate]." *Id.* at 333, 471 A.2d at 369. "All we decide here," the court said, "is that private land is not immune from a possible right of access to the foreshore . . . or [use of the dry-sand area] by the public incidental to the right of bathing and swimming." *Id.* at 333-34, 471 A.2d at 369. Because court decisions are subject to a challenge on the grounds that they effect a taking of private property in violation of the fifth amendment, *see infra* note 206 and accompanying text, the court in *Matthews* carefully limited its decision to the beach area at issue, finding that the public interests outweighed the private interests. *See Matthews*, 95 N.J. at 324, 471 A.2d at 365 ("[P]articular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved.").

188. *Matthews*, 95 N.J. at 325-26, 471 A.2d at 365.

189. *Id.* (quoting Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972)).

190. Sax, *supra* note 130, at 474.

191. *See, e.g.*, State *ex rel.* Thornton v. Hay, 254 Or. 584, 588, 462 P.2d 671, 673 (1969) (dry-sand area "could not be used conveniently . . . for any other purpose" other than recreational use).

192. Sax, *supra* note 130, at 561.

193. *Id.* at 560. *But see* Bott v. Natural Resources Comm'n, 415 Mich. 45, 86, 327 N.W.2d 838, 853 (1982) (The courts are "not an appropriate forum for resolving the competing societal values which underlie this controversy [over public trust lands]" and thus a "comprehensive legislative solution" is needed.).

194. Sax, *supra* note 130, at 560. A dissenting justice in City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974), made the same point:

> What is overlooked by the majority is that as to prescriptive public coastal areas, navigable waters, tide lands and sovereignty lands, the judiciary has a positive and solemn duty as a last resort to protect the public's rights to the enjoyment and use of any of such lands. There is ample precedent of this Court to afford this protection, including those relating to the inalienable trust doctrine in sovereignty lands and navigable areas.

Id. at 81 (Ervin, J., dissenting).

195. *See, e.g.*, Adams v. Department of Natural & Economic Resources, 295 N.C. 683, 693, 249

reasons, the public trust doctrine as applied by the New Jersey court in *Matthews* is the most useful judicial tool for developing a North Carolina open beach policy.

Recent North Carolina legislation and a recent report by the Legislative Research Commission[196] (the "Commission") support the conclusion that the public trust doctrine is a viable tool for establishing an open beach policy in North Carolina. The Commission found that North Carolina "has been one of the leading states in the protection of submerged lands"[197] and generally has prohibited the granting of navigable beds . . . in a way that would restrict the use of the waters for commerce, for fishing and for other pleasure activities."[198] The report recommended that the North Carolina General Assembly enact legislation to provide for the management and protection of the public trust resources held by the state.[199] In response, the general assembly passed two acts that clarify existing public trust rights. The first act states that property subject to public trust rights may not be acquired by adverse possession.[200] Public trust rights, as defined by the act, "are established by common law as interpreted by the courts of this State,"[201] and "include public access to the beaches."[202] The second act states that beach land "raised above the mean high water mark by publicly financed projects vests in the State."[203] Furthermore, these lands are subject to the public trust and "shall remain open to the free use and enjoyment of the people of the State."[204] Although public beach access is included in the definition of public rights, it is doubtful that expansion of the public trust doctrine to include the dry-sand area will be accomplished by this or any legislation; indeed, other than the brief reference in the definition of public rights, public beach access is not mentioned as a priority.

3. Constitutional Considerations in Judicial Expansion of the Public Trust Doctrine

Judicial expansion of the public trust doctrine may be challenged as a taking[205] of private property for public benefit without just compensation in viola-

S.E.2d 402, 408 (1978) (The "special and urgent environmental problems found in the coastal zone . . . warrant special . . . attention.").

196. LEGISLATIVE RESEARCH COMM'N, COASTAL SUBMERGED LANDS, REPORT TO THE 1985 GENERAL ASSEMBLY OF NORTH CAROLINA (1985).

197. *Id.* at 8.

198. *Id.*

199. *Id.* at 15-16.

200. Act of May 30, 1985, ch. 277, § 1, 1985 N.C. Sess. Laws 7 (amending N.C. GEN. STAT. § 1-45 (1983)) (to be codified at N.C. GEN. STAT. § 1-45.1).

201. *Id.* The language "as interpreted by the courts of this State" suggests that although the general assembly recognizes existing public trust rights, it leaves the delineation of the scope of those rights to the courts.

202. *Id.*

203. Act of May 30, 1985, ch. 276, § 1(2), 1985 N.C. Sess. Laws 6 (amending N.C. GEN. STAT. § 146-6 (1983)) (to be codified at N.C. GEN. STAT. § 146-(6)(f)).

204. *Id.*

205. A taking "is constitutional law's expression for any sort of publicly inflicted private injury for which the constitution requires payment of compensation." Michelman, *Property Utility and*

tion of the United States Constitution.[206] Although the original taking concept may "have contemplated only actual physical appropriation,"[207] Supreme Court decisions have made clear that a taking also may occur when the government interferes with the rights of private property ownership.[208] Expansion of the public trust doctrine to include the dry-sand beach may not deprive private owners of all use of their property, but it may deprive them of rights incidental to that property.

A court's declaration that the public trust doctrine protects public use of a dry-sand beach may be an unconstitutional taking because it effects a change in existing property law.[209] Although the North Carolina courts never have ad-

---

Fairness: Comments on the Ethical Foundation of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1165 (1967).

206. The fifth amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This provision is applicable to the states through the fourteenth amendment. Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

An uncompensated taking is also a violation of the North Carolina Constitution: "No person shall . . . be deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19. The "law of the land" has been interpreted to include the principle that there can be no taking of private property without just compensation. DeBruhl v. State Highway and Public Works Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958).

207. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 483 (1983). Such physical appropriation, however, might be a proper exercise of the state's eminent domain power if compensation is made and the acquisition is for public use. *Id.* at 495. The fifth amendment's "limitation on taking private property is a tacit recognition that the power to take private property exists." *Id.* at 481. Every state constitution, except that of North Carolina, limits exercise of the eminent domain power. 1 NICHOLS ON EMINENT DOMAIN § 1.3, at 79 (J. Sackman rev. 3d ed. 1973).

208. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979) (interference with landowner's right to exclude others held to be an unconstitutional taking); United States v. Causby, 328 U.S. 256 (1946) (frequent flights of government planes over plaintiffs' land interfered with use of air space and constituted a taking); Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) (invalidating Pennsylvania law prohibiting coal mining).

209. *See* Hughes v. Washington, 389 U.S. 290 (1967) (The law that land gained through accretion belongs to the owner of adjoining land was not "open to question" and thus a declaration by the State of Washington that it owned accreted land was an unconstitutional taking.). A concurring justice in *Hughes* was more direct:

> There can be little doubt about the impact of that change [in property law] upon Mrs. Hughes. The beach she had every reason to regard as hers was declared by the state court to be in the public domain. . . . Although the state in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so.

Id. at 298 (Stewart, J., concurring). The change in property law attempted by the State of Washington in *Hughes* affected ownership of the dry-sand beach. This Comment does not recommend that North Carolina courts assert state ownership of private dry-sand beaches. *See supra* note 173.

The Massachusetts Supreme Court has held that a public right of passage along the foreshore beaches is not a right recognized by the original colonial ordinance and therefore a bill proposing to create such a right was unconstitutional. *In re* Opinion of the Justices, 313 N.E.2d 561, 566-67 (Mass. 1974). The colonial ordinance extended littoral ownership to the mean low-tide line, *id.* at 565, making Massachusetts one of the few states granting such ownership. *See supra* note 138 and accompanying text. Proponents of the bill argued that the legislation was "merely an exercise of existing public rights" and not a change in property law. *Opinion of the Justices*, 313 N.E.2d at 566. The proponents also argued that although the original ordinance authorized public navigational and fishing uses of the foreshore, public uses had changed, and the ordinance "now must be deemed to include the important public interest in recreation." *Id.* at 567. The court disagreed, stating that "the grant to private parties effected by the colonial ordinance has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights as would result from such an interpretation." *Id.* Because the public trust rights were specified in the Massachusetts ordinance, the

dressed directly the scope of public trust rights,[210] the supreme court has stated that the foreshore is public trust land and is therefore "reserved for the use of the public."[211] Most of the North Carolina decisions, however, have involved the extent of private ownership or littoral rights under the public trust doctrine and not the extent of public rights.[212] Thus, though the law may be settled on the issue of ownership, it is not settled on the issue of the extent and availability of public trust rights.[213]

The fundamental constitutional problem presented by the public trust doctrine is not that it works a change in existing property law, but that it deprives the owner of property rights incidental to ownership. In determining whether a taking has occurred, the courts have developed two tests.[214] The first is a literal taking test, which is applied when there is an actual physical appropriation of private property.[215] Under this test, such an appropriation is a taking per se,

---

court's decision was an interpretation of statutory rights rather than common-law rights. There is no similar language in North Carolina statutes or in the North Carolina Constitution. At least one commentator, however, suggests that extensions of common-law doctrines to provide public access to beaches are unconstitutional takings. *See* Note, *Assault on the Beaches: "Taking" Public Recreational Rights to Private Property*, 60 B.U.L. REV. 933 (1980); *see also* Van Ness v. Borough of Deal, 78 N.J. 174, 185-89, 393 A.2d 571, 577-78 (1978) (Mountain, J., dissenting) (majority's holding that public trust doctrine requires all municipal beaches to be opened to general public was an unconstitutional taking).

210. *See supra* notes 155-58 and accompanying text.

211. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 299, 177 S.E.2d 513, 515 (1970).

212. *See, e.g., id.* (when eroded beach was filled in and raised back above sea-level by town, title vested in town; plaintiff's title was lost when the property eroded and became part of foreshore); Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968) (littoral owner has right to construct pier to provide passage to sea, but passage under pier must be unobstructed over width of foreshore); McKenzie's Ex'rs v. Hulet, 4 N.C. (Taylor) 613 (1817) (littoral rights do not include title to foreshore).

213. The dissenting justice in Bott v. Natural Resources Comm'n., 415 Mich. 45, 327 N.W.2d 838 (1982) stated that the Michigan law regarding public navigational rights under the public trust doctrine was not " 'well-settled' " because "no conflict has existed in prior determinations concerning the navigability or permissible public uses of our inland lakes and streams." *Id.* at 127, 327 N.W.2d at 872 (Moody, J., dissenting). It also has been suggested that the public trust is not so well-defined that other public rights could not be established under it. *See* 1 WATER & WATER RIGHTS, *supra* note 138, § 36.4(B), at 202 (Limiting the public trust doctrine by suggesting that all public rights are already defined "confuses the application of the principle under given circumstances with the principle itself.").

214. One of the tests was developed by Justice Harlan, the other by Justice Holmes. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 207, at 483. Justice Harlan believed a taking occurred only when the government actually appropriated land. *Id.* Justice Holmes, however, took a broader view and found a taking whenever government regulation significantly restricted a landowner's use of property. *Id.* at 484. The Court "much to the consternation of commentators has retained to some extent both the theories of Holmes and Harlan" and has not developed a "single framework to define a taking." *Id.* at 485. Professor Sax has commented that "the [Supreme] Court has settled upon no satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting, theories without developing any clear approach to the constitutional problem." Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 46 (1964). Similarly, Justice Brennan has noted that taking cases are "essentially ad hoc, factual inquiries." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

215. In Mugler v. Kansas, 123 U.S. 623 (1887), the Supreme Court applied the literal taking test and held that a statute prohibiting the manufacture of liquor was not a taking of a beer manufacturer's property. Such a prohibition, the Court declared, was not "in any just sense, . . . an appropriation of property for the public benefit." *Id.* at 668-69. Although never overruled, the language in *Mugler* has been "judiciously ignored . . . in cases where non-acquisitive governmental action has been found to be a taking." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 207, at 484.

and compensation must be given.[216] The second test is a regulatory taking test, which is applied when there is not a literal appropriation but an interference with a property owner's use of property.[217] Under this test, a court will balance the benefits to the public with the harm to the property owner to determine whether a taking has occurred.[218] Although it is not always clear which of these two tests a court will apply, a recent United States Supreme Court opinion attempted to clarify the general taking principles and to distinguish the use of the two tests.

In *Loretto v. Teleprompter Manhattan CATV Corp.*,[219] the Supreme Court held that a New York statute requiring landlords to permit installation of cable television equipment on their property was a taking of private property for which the landlords were owed compensation.[220] In its holding the Court distinguished between a permanent physical occupation and a temporary physical invasion;[221] the former is a per se taking under the literal taking test,[222] and the latter is subject to the balancing process under the regulatory test.[223]

The Court in *Loretto* did not give a concise definition of a permanent physical occupation,[224] but cases cited by it suggest that in at least two situations a taking will always be found. The first is when private property is actually invaded by water, earth, sand, other materials, or artificial structures.[225] The second is when the government takes possession and control of all or part of private property without compensation.[226] The facts in *Loretto* involved the first situa-

---

216. *See* Michelman, *supra* note 205, at 1184; *see also* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1871) ("[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking . . . .").

217. This view was developed by Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In *Pennsylvania Coal* a state statute prohibiting coal mining was held to be a taking without compensation.

218. *See infra* notes 238-51 and accompanying text.

219. 458 U.S. 419 (1982). For discussions of the case, see Note, *Access for CATV Meets the Taking Clause: The Per Se Takings Rule of* Loretto v. Teleprompter Manhattan CATV Corp., 25 ARIZ. L. REV. 689 (1983); Note, Loretto v. Teleprompter: *A Restatement of the Per Se Physical Invasion Test for Takings*, 35 BAYLOR L. REV. 373 (1983).

220. *Loretto*, 458 U.S. at 438. The cable was installed on appellant's roof and was less than one-half inch in diameter and approximately 35 feet in length. *Id.* at 422. Directional taps, measuring four inches by four inches also were installed on the front and rear of the roof. *Id.* Finally, two large silver boxes were installed along the roof cables. *Id.* Because the "installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and . . . exterior wall" it was a taking "under the traditional test." *Id.* at 438. Presumably, the traditional test is the literal taking test.

221. *Id.* at 428-35.

222. *See supra* notes 215-16 and accompanying text.

223. *See infra* notes 238-51 and accompanying text.

224. In a footnote, however, the Court cited Professor Michelman's summary of physical invasion case law: " 'The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.' " *Loretto*, 458 U.S. at 427 n.5 (quoting Michelman, *supra* note 205, at 1184).

225. *See id.* at 427-30 (citing Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904); St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)).

226. *See Loretto*, 458 U.S. at 431 (citing United States v. Pewee Coal Co., 341 U.S. 114 (1951)).

tion: installation of the cable equipment was "a direct physical attachment of plates, boxes, wires, bolts, and screws to the . . . roof and . . . exterior wall" of appellant's building.[227] A third situation constituting a per se taking may arise when a government regulation is "an intrusion 'so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it.' "[228] In such cases, however, a per se taking likely will be inferred only when the intrusion is tantamount to actual appropriation.[229] When the intrusion is less than an actual appropriation, a court will apply the regulatory balancing test.[230]

The *Loretto* Court stated that its holding was "very narrow" and emphasized that it was merely affirming "the traditional rule that a permanent physical occupation of property is a taking."[231] Thus, it considered the distinction between a permanent physical occupation and a temporary physical invasion to have been drawn by earlier cases; its decision merely clarified and applied the established law.[232] The Court also suggested that determining whether a permanent physical occupation has occurred would not be difficult, noting that "[t]he placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute."[233]

Does the granting of public access rights in the dry-sand beach result in a permanent physical occupation or a temporary physical invasion? Arguably, an

---

227. *Id.* at 438.

228. *Id.* at 431 (quoting United States v. Causby, 328 U.S. 256 (1946)).

229. *See* United States v. Causby, 328 U.S. 256 (1946). The taking in *Causby* involved frequent flights of government planes over plaintiffs' chicken farm. The disruption caused by the planes resulted in plaintiffs' loss of their chicken business. The Court compared this disruption to actual appropriation and stated that if plaintiffs "could not use [their] land for any purpose, their loss would be . . . as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Id.* at 261.

The rationale in *Causby* had been developed in a line of cases beginning with Peabody v. United States, 231 U.S. 530 (1913). In *Peabody* the Court stated in dictum that if the government acted "with the purpose and effect of subordinating [petitioners' land] to the [rights] of the Government . . . with the result of depriving the owner of [the land's] profitable use" the government action would be a taking. *Id.* at 538. The intent of the government to impose a servitude on private property could be inferred from the government action; no actual intent would be necessary. *See* Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-30 (1922) (evidence of government's firings of guns from a gun battery could be sufficient to infer intent).

230. *See Loretto*, 458 U.S. at 432; *see also* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (Court used balancing test in upholding state law requiring shopping center owners to permit exercise of individual free speech and petition rights); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (Court applied balancing test and held imposition of navigational servitude requiring public access to a pond to be a taking).

231. *Loretto*, 458 U.S. at 441; *see also* Stillings v. Winston-Salem, 311 N.C. 689, 697, 319 S.E.2d 233, 239 (1984) (court noted that *Loretto* restates factors to be considered in determining the existence of a taking).

232. *Loretto*, 458 U.S. at 426-35. The court noted that the rule that a permanent occupation is a taking "has more than tradition to commend it." *Id.* at 435. An occupation, the Court said, is "perhaps the most serious form of invasion of an owner's property interests [because] the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.* (citing Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).

233. *Id.* at 437. Justice Blackmun argued in dissent that the "strained and untenable distinction," *id.* at 442 (Blackmun, J., dissenting), between permanent physical occupations and temporary physical invasions was "less substantial than the distinction between physical and nonphysical intrusions that the Court already has rejected." *Id.* at 448 (Blackmun, J., dissenting).

easement allowing for public access and recreational use is an occupation because it contemplates the continuous use of private property. Under the reasoning in *Loretto* and the cases cited therein for support, however, such an easement is not an occupation but a temporary invasion. First, the easement does not require the intrusion of water, or other materials, or artificial structures.[234] Second, it does not require that the government take actual possession of all or part of the private property.[235] Third, it does not contemplate an intrusion that is tantamount to actual appropriation.[236] Last, dicta in *Loretto* and the Court's approval of previous cases applying a balancing test suggest that a recreational easement in the dry-sand beach would not be a permanent physical occupation.[237]

If expansion of the public trust doctrine to include the dry-sand beach is a temporary physical invasion, it will be scrutinized under the regulatory balancing test.[238] In applying this test, the North Carolina Supreme Court has balanced "the diminution in value of an individual's property and the corresponding gain to the public."[239] In upholding an ordinance regulating the appearance of junkyards, the court in *State v. Jones*[240] noted that gain to the public can be measured by the "corollary benefits to the general community," as well as by the protection afforded the public's health, safety and morals.[241] Benefits, according to the court, include "protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents."[242] Expansion of the public trust doctrine to include the dry-sand beach provides many benefits to the public, including promotion of tourism and promotion of the comfort, happiness and emotional

234. *See supra* note 225 and accompanying text.

235. *See supra* note 226 and accompanying text.

236. *See supra* notes 228-29 and accompanying text. This is particularly true in North Carolina for two reasons. First, an upland owner has no right under North Carolina law to develop the dry-sand beach. Regulations under the Coastal Area Management Act, N.C. GEN. STAT. §§ 113A-100 to -134.3 (1983), prohibit development on the beach area between the mean low tide line and the recession line (last line of significant erosion), a line that is always landward of the vegetation line. *See* N.C. Coastal Resoures Comm'n Reg., 15 N.C. ADMIN. CODE 7H.0304 (1985). Second, because most North Carolina beaches historically have been open to and used by the public, *see supra* note 20, a judicial determination that these areas must be open to the public would not significantly change current use.

237. *See, e.g., Loretto*, 458 U.S. at 433 (citing with approval Kaiser Aetna v. United States, 444 U.S. 164 (1979)). In *Kaiser Aetna* the Court applied the regulatory balancing test to an imposition of a navigational servitude for public access to a pond. The Court in *Loretto* stated that "[a]lthough the *easement of passage, not being a permanent occupation* of land, was not considered a taking per se, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character." *Id.* at 433 (emphasis added). For an example of similar dictum, see *supra* text accompanying note 233.

238. *See supra* note 217 and accompanying text and text accompanying note 218.

239. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 218, 258 S.E.2d 444, 451 (1979) (citing Sax, *supra* note 214); *accord* State v. Jones, 305 N.C. 520, 526, 290 S.E.2d 675, 679 (1982).

240. 305 N.C. 520, 290 S.E.2d 675 (1982). The court upheld the ordinance under both the North Carolina Constitution and the United States Constitution. *Id.* at 531, 290 S.E.2d at 681-82.

241. *Id.* at 530, 290 S.E.2d at 681.

242. *Id.* (citing Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603 (1981)).

stability of area residents.[243] More importantly, expansion of the public trust doctrine preserves a public recreational use that is vital to the welfare of society.[244]

The countervailing interest, diminution in value of private property, is more difficult to assess.[245] One factor to be considered in determining the diminution in value of private property is whether "the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use."[246] In the land use regulation context, this determination often has turned on the landowner's reasonable investment-backed expectations for the use of the property.[247] When a public right of access is impressed on the dry-sand beach, the issue is whether an oceanfront property owner has a reasonable expectation of the right to exclude others from the beach. The United States Supreme Court in *Kaiser Aetna v. United States*[248] concluded that the right to exclude "so universally held to be a fundamental element of the property right, falls within [the] category of interests the Government cannot take without compensation."[249] The "value" of the right to ex-

243. These are, of course, the public benefits. Property owners will argue that beach access legislation reduces property values and destroys the character and integrity of the community. One commentator has stated that allowing public access to the beaches is the "tragedy of the beach," because the beachgoer, no longer fearful of being ousted, "can be noisy, have a good time and deposit more litter than he takes away." Roberts, *supra* note 21, at 179. The court in Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 430 A.2d 881 (1981) expressed another view:

> Solitary walks along the shore and tranquil evenings spent among friends on the beach comprise a dream many of us share. But this dream may not be fulfilled by excluding others who ask for only the simpler pleasure of engaging in ocean bathing and beach activities . . . . The ocean water along our coastline belongs to all . . . citizens . . . .

Id. at 230-31, 430 A.2d at 888.

244. "[H]ealth, recreation, and sports are encompassed in and intimately related to the general welfare of a well-balanced state." Matthews v. Bay Head Improvement Ass'n., 95 N.J. 306, 321, 471 A.2d 355, 363 (1984) (quoting New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. 457, 488, 292 A.2d 580, 598 (Law Div. 1971), *aff'd*, 61 N.J. 1, 292 A.2d 545 (1972), *cert. denied*, 414 U.S. 989 (1973)).

245. In determining the diminution in value of private property, the courts examine the extent of the interference with rights in the entire fee, not just the particular part of the fee directly impacted. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978) (" 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . . . [It] focuses rather . . . [on] the parcel as a whole . . . .").

246. State v. Jones, 305 N.C. 520, 530, 290 S.E.2d 675, 679 (1982).

247. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) ("The economic impact of the regulation on the [landowner] and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations."). Protection of a landowner's reasonable expectations is a fundamental property law concept. *See* Michelman, *supra* note 205, at 1211-13.

248. 444 U.S. 164 (1979).

249. *Id.* at 179-80. The controversy in *Kaiser Aetna* centered on the dredging of a 523-acre pond in a residential community in Hawaii. Construction of a marina on the pond involved connecting the pond to navigable waters in Maunalua Bay. Following construction, the Army Corps of Engineers declared the pond to be navigable water and demanded that the public be granted a right of access. The Supreme Court held this declaration to be a taking without just compensation. Justice Blackmun, in a strong dissent, concluded after balancing the public benefits and private harm that no taking had occurred. *Id.* at 187-91 (Blackmun, J., dissenting).

In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), a privately owned shopping center was denied the right to exclude pamphleteers from its central courtyard. The Court did not find that a taking had occurred. This case, however, can be distinguished from *Kaiser Aetna* because

clude is properly measured by the extent of public interference with the landowner's recreational use of the beach, the extent of injury to enjoyment of the landowner's upland property,[250] and the investment value of exclusivity.[251]

In North Carolina, a landowner's investment-backed expectation of the right to exclude the public from the dry-sand beach is minimal. Traditional use of this area for recreation and passage to the foreshore[252] will make it difficult for a landowner to establish that privacy on the dry-sand beach was a substantial part of the investment in oceanfront property.[253] Furthermore, because the dry-sand beach in North Carolina may not be developed,[254] a landowner cannot argue that the value of development rights in that area will be impaired by public use.[255] Thus, expansion of the public trust doctrine to include the dry-sand beach should survive a taking challenge when the beach property at issue is in an area of traditional public use.

IV. BEACH ACCESS LEGISLATION

At least six jurisdictions have enacted legislation designed to secure a public right of beach access. Beach access legislation seeks to prohibit interference with the public's right to have access to and use of the beaches. The shoreline

---

the shopping center was normally open to the public. Therefore, the right to exclude persons could not be shown to be "so essential to the use or economic value of [the shopping center's] property that the state-authorized limitation of it amounted to a taking." *Id.* at 84. This refinement of the right to exclude makes it more difficult for the landowner to show a taking.

250. For example, noisy beach parties could interfere with a landowner's enjoyment of upland property.

251. For example, rental and property values could fall if a beach area becomes too crowded. Crowded beaches, however, may indicate high demand, which in turn raises rental and property values.

When a court requires public access over upland property, diminution in value includes not only the value of the right to exclude, but also the value of the right to develop property to its full potential.

252. *See supra* note 20.

253. The Supreme Court in *Kaiser Aetna* noted that petitioners had invested millions of dollars to improve the pond on the assumption that it would be private. *Kaiser Aetna*, 444 U.S. at 180. If the pond were opened to the public the value of lots within the development would decrease substantially and annual fees would be lost. *Id.* Thus, the investment-backed expectations of petitioners were significant.

In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), however, the Court found that a state law preventing the exclusion of pamphleteers from petitioners' property did not interfere with the shopping center's value or continuing commercial functions. *Id.* at 83. Constitutionally permitted "time, place, and manner regulations" ensured that the expressive activities did not interfere with normal business activities. *Id. See also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978) (petitioners would not only continue to gain profits but also would receive a "reasonable return" on their investment).

254. *See supra* note 236.

255. In Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), the Supreme Court stated that the landowners' submission that a taking may be established "simply by showing that [the landowners have] been denied the ability to exploit a property interest that [they] heretofore had believed was available for development is quite simply untenable." *Id.* at 130. It is conceivable that the value of upland development rights could be impaired by public use of the dry-sand area. In areas of traditional public use of the beach, however, any diminution in value of upland property would be outweighed by the corresponding gain to the public. Furthermore, "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." Armstrong v. United States, 364 U.S. 40, 48 (1960).

affected by the legislation includes the stretch of dry-sand beach inland to the vegetation line;[256] statutes in Texas and the Virgin Islands specify that dredging and filling will not alter the line.[257]

A. *Legal Basis of Beach Access Legislation*

Proponents of beach access legislation assert that states can properly regulate land use.[258] Although state land use regulations can be enacted to protect state interests,[259] the regulations are subject to state and federal constitutional limitations.[260] The constitutional issues raised by beach access legislation are discussed below.

1. Is Beach Access Legislation Unconstitutional Local Legislation?

State beach access legislation in North Carolina is subject to the challenge that it is "local legislation" in violation of the North Carolina Constitution.[261] The North Carolina Coastal Area Management Act (CAMA)[262] was challenged as local legislation[263] in *Adams v. Department of Natural & Economic Re-*

256. *See* CAL. GOV'T CODE §§ 53035-53036, 54091-54093 (West 1983); CAL. PUB. RES. CODE §§ 30210-30224 (West 1977 & Supp. 1985); GUAM GOV'T CODE § 13453 (Supp. 1974); HAWAII REV. STAT. § 115-5 (1976); OR. REV. STAT. § 390.605(2) (1977); TEX. NAT. RES. CODE ANN. § 61.012 (Vernon 1978); V.I. CODE ANN. tit. 12, § 402(b) (1982).

257. TEX. NAT. RES. CODE ANN. § 61.017(a) (Vernon 1977); V.I. CODE ANN. tit. 12, § 402(b) (1982).

258. These commentators note that due process does not prohibit a state from instituting zoning restrictions or redefining property rights. *See* Comment, *Coastline Crisis*, 2 PAC. L.J. 226, 236 (1971); Comment, *supra* note 81, at 814; Comment, *Easements: Judicial & Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586, 592-93 (1973); *see also* Marsh v. Alabama, 326 U.S. 501, 506 (1945) ("Ownership does not always mean absolute dominion.").

259. For a general discussion of state involvement in land use decisions, see R. HEALY & J. ROSENBERG, LAND USE AND THE STATES (2d ed. 1979); R. LINOWES & O. ALDENSWORTH, THE STATES AND LAND USE CONTROL (1975).

260. *See generally* D. GODSCHALK, D. BROWER, L. MCBENNETT & B. VESTAL, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT (1977) (discussion of constitutional implications of land use planning).

261. "The General Assembly shall not enact any local, . . . or special act or resolution . . . . (c) [a]uthorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets or alleys . . . ." N.C. CONST. art. II, § 24. The General Assembly may, however, enact laws to regulate these areas. N.C. CONST. art. II, § 24(4).

The term "highway" is the generic name for all kinds of public ways including carriageways, bridleways, and footways. Parsons v. Wright, 223 N.C. 520, 521, 27 S.E.2d 534, 536 (1943). The term "street" includes all public ways in a city, town, or village. *Id.* Beach accessways fall under the North Carolina prohibition against local legislation because they are footways.

For a discussion of the history of the constitutional provision prohibiting local legislation and its interpretation in the North Carolina courts, see Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C.L. REV. 340 (1967).

262. N.C. GEN. STAT. § 113A-100 to -134.3 (1983). For a general history and analysis of CAMA, see Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. REV. 303 (1974); Heath, *A Legislative History of the Coastal Area Management Act*, 53 N.C.L. REV. 345 (1974); Schoenbaum, *The Management of Land and Water Use in the Coastal Zone: A New Law is Enacted in North Carolina*, 53 N.C.L. REV. 272 (1974); Schoenbaum & Rosenberg, *The Legal Implementation of Coastal Zone Management: The North Carolina Model*, 1976 DUKE L.J. 1.

263. *See* Glenn, *supra* note 262, at 306-14 for an analysis of CAMA under the local legislation limitation.

sources.[264] The North Carolina Supreme Court held that the application of CAMA to a localized area was "reasonably related to [the] purpose"[265] of treating "the special and urgent problems" of the coastal area, and therefore the Act was not unconstitutional local legislation.[266]

Legislation that affects only one area of the state is not prohibited as local legislation if it "defines a class which reasonably warrants special legislative attention"[267] and which is neither underinclusive nor overinclusive.[268] In *Adams* the supreme court found that the "irreplaceable nature of the coastal zone and its significance to the public welfare" justified special legislative treatment, and that the coastal counties constituted a valid legislative class.[269]

Beach access legislation, if drafted within the *Adams* guidelines, should survive a local legislation challenge. The North Carolina Supreme Court has held with respect to streets and highways that legislation is not a local act unless it authorizes the "laying out, opening, altering, or discontinuing of a *given particular and designated* highway, street or alley."[270] Thus, beach access legislation establishing public rights in upland areas should leave particular location of accessways to the discretion of local governments. Legislation that establishes public rights in the dry-sand beach, however, may be attacked as invalid local legislation because it applies to a given, particular, and designated area. The court's decision in *Adams* suggests that this attack will fail.[271]

2. Is Beach Access Legislation an Unconstitutional Delegation of Authority to an Administrative Agency?

Petitioner in *Adams* charged that the General Assembly had unconstitutionally delegated authority to the Coastal Resources Commission (the CRC) to promulgate rules and regulations under CAMA.[272] The general rule, applied in *Adams*, is that legislative delegation of limited adjudicative and rule-making

264. 295 N.C. 683, 249 S.E.2d 402 (1978).

265. *Id.* at 696, 249 S.E.2d at 410.

266. *Id.* at 693, 249 S.E.2d at 408.

267. *Id.* at 690-91, 249 S.E.2d at 407.

268. *Id.* at 690, 249 S.E.2d at 407. The legislation also must be uniformly applied. *Id.* at 692, 249 S.E.2d at 410.

269. *Id.* at 693, 249 S.E.2d at 408.

270. Deese v. Town of Lumberton, 211 N.C. 31, 34, 188 S.E. 857, 858 (1936) (emphasis added); *accord* State v. McBane, 276 N.C. 60, 67, 170 S.E.2d 913, 918 (1969); *In re* Assessments, 243 N.C. 494, 498, 91 S.E.2d 171, 173-74 (1956).

271. It is unclear what constitutes a given, particular, and designated highway, street or alley. Under an *Adams* analysis, designation of the dry-sand area as a public accessway is "reasonably related to the purpose" of providing beach access. *Adams*, 295 N.C. at 691, 249 S.E.2d at 407. *See supra* text accompanying notes 265-266.

272. *Adams*, 295 N.C. at 689, 249 S.E.2d at 404. The CRC is the body charged with administering CAMA. It sets guidelines for local land use plans and has review and approval authority over them. *See* N.C. GEN. STAT. § 113A-107 (1983).

The North Carolina Constitution provides that the "legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6. The North Carolina Supreme Court has interpreted this requirement to mean that the general assembly "may not abdicate its power to make laws or delegate its *supreme* legislative power to any other coordinate branch or to any agency which it may create." North Carolina Turnpike Auth. v. Pine Island, Inc., 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965).

powers is permissible if "adequate guiding standards" are provided to govern the exercise of the powers.[273] The court in *Adams* concluded that the authority delegated to the CRC was accompanied by adequate guiding standards "in the form of legislative declarations of goals and policies, and procedural safeguards."[274]

Authority granted to an administrative agency by beach access legislation could easily meet the *Adams* guidelines.[275] Such legislation, however, would not need to meet the *Adams* criteria if it did not delegate authority to administrative agencies. This approach follows the pattern of most existing beach access legislation. Enforcement is provided by state attorneys general, with resort to state courts when necessary.[276]

3. Is Beach Access Legislation an Unconstitutional Taking of Private Property for Public Use?

A third challenge to beach access legislation may be that it constitutes a "taking" of private property in violation of the fifth amendment.[277] The taking doctrine not only prohibits actual confiscation of property by the government, it also defines the "outer limits of permissible uncompensated regulation"[278] by balancing the extent of harm to the landowner and the benefit afforded the public.[279] Beach access legislation that proposes to vest title to private beaches in

273. *Adams*, 295 N.C. at 698, 249 S.E.2d at 411; *accord* State *ex rel.* Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 158, 232 S.E.2d 698, 706 (1977); Guthrie v. Taylor, 279 N.C. 703, 712, 185 S.E.2d 193, 200 (1971), *cert. denied*, 406 U.S. 920 (1972).

274. *Adams*, 295 N.C. at 701, 249 S.E.2d at 412-13. The court listed four sources of procedural safeguards: (1) the Act itself; (2) the North Carolina Administrative Procedure Act; (3) the Administrative Rules Review Committee created by N.C. GEN. STAT. § 120-30.26 (1978); and (4) the "Sunset" legislation at N.C. GEN. STAT. §§ 143-34.10 to -35.1 (repealed by 1981 N.C. Sess. Laws 932). Under the "Sunset" legislation, unless CAMA was "revived by legislative action" it would be repealed effective July 1, 1981. *Adams*, 295 N.C. at 702, 249 S.E.2d at 413. For an analysis of the general assembly's delegation of authority under CAMA, see Glenn, *supra* note 262, at 314-27.

275. *See supra* text accompanying note 273. The *Adams* court stated that "[i]n passing upon the constitutionality of a legislative act it is not for this Court to judge its wisdom and expediency. These matters are the province of the General Assembly." *Adams*, 259 N.C. at 690, 249 S.E.2d at 406.

276. *See, e.g.*, TEX. NAT. RES. CODE ANN., §§ 61.018 -.019 (Vernon 1978).

277. *See supra* note 206; *see, e.g.*, United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769, 772 (D.V.I. 1974) (Virgin Islands Open Beach Act effected no taking of defendant landowner's property rights without just compensation); Seaway v. Attorney Gen., 375 S.W.2d 923, 929 (Tex. Civ. App. 1964) (court declined to rule on constitutionality of Texas Open Beaches Act). The uncompensated taking challenge also can be asserted against court decisions affecting property rights. *See supra* note 206.

278. Glenn, *supra* note 262, at 327.

279. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (When the extent of diminution of private property reaches a certain magnitude, there must be an exercise of eminent domain and compensation to sustain the act.). *See generally* F. BOSSELMAN, O. CALLIES & J. BANTA, THE TAKING ISSUE (1973) (general discussion of taking); Michelman, *supra* note 205 (questioning courts' practice of compensating for some, but not all, injuries to private property that result from government action); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) (challenging traditional view of property rights and arguing that broader questions of resource regulation and costs of conflict should determine takings); Sax, *supra* note 214, at 36 (analyzing traditional approaches to problem of taking). For a discussion of the taking law in North Carolina, see Note, *North Carolina's Ridge Law: No View From The Top*, 63 N.C.L. REV. 197, 208-14 (1984).

the public is an obvious taking.[280] The difficulties arise in determining whether regulations granting public access easements so restrict a landowner's property use as to be a constructive taking of the property for public use.[281]

An initial question is whether the regulation is a proper exercise of the police power.[282] This essentially is a due process inquiry into the legitimacy of the ends sought and the reasonableness of the means adopted by the regulation.[283] The scope of the police power is broad enough to encompass most stated purposes of legislation.[284] The validity of the means, however, is less certain. Whether the means are reasonable depends on their promotion of the public good and the amount of interference with the property owner's right to use the property as the owner deems appropriate.[285]

The second step of the due process analysis requires the court to determine whether the regulation as applied constitutes a taking of private property.[286] In making this determination the courts will apply either the literal taking test[287] or the regulatory taking test[288] to determine whether there has been a judicial taking of private property.[289] If a court holds that legislation actually has appropriated private property, that will be an unconstitutional taking.[290] If there has been no actual appropriation, the court will apply the regulatory balancing

280. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 28, at 513. Such legislation, however, might be a proper exercise of the state's eminent domain power if compensation is made and the acquisition is for public use. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 207, at 495.

281. Taking by regulation was not recognized until 1922 when the Supreme Court invalidated a Pennsylvania law prohibiting coal mining. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

282. *See* Responsible Citizens v. City of Asheville, 308 N.C. 255, 261-62, 302 S.E.2d 204, 208 (1983). The police power gives states the authority to regulate land use in order to protect the public health, safety, morals, or general welfare. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (application of law that required preservation of historic property did not constitute a taking); Goldblatt v. Hempstead, 369 U.S. 590 (1962) (limits on excavating below the water table not shown to be such an onerous and unreasonable burden on sand and gravel operation as to result in a taking of property); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (prohibition of brick manufacturing within city limits held not to be a taking of property without due process); Mugler v. Kansas, 123 U.S. 623, 661 (1887) (legislature has power to determine what "measures are appropriate or needful" to promote general welfare). Government could not function if every change in the general law that diminished property values had to be compensated. *See Pennsylvania Coal*, 260 U.S. at 393. Regulation that "goes too far," however, "will be recognized as a taking." *Id.* at 415. The Court in *Pennsylvania Coal* noted that when fifth amendment protection is "qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* at 417.

283. Responsible Citizens v. City of Asheville, 308 N.C. 255, 261-62, 302 S.E.2d 204, 208 (1983).

284. Even wholly aesthetic purposes have been upheld. *See* State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982) (North Carolina Supreme Court upheld ordinance requiring junkyards to put fences around property). For an analysis of aesthetic regulation, see Note, State v. Jones: *Aesthetic Regulation—From Junkyards to Residences?*, 61 N.C.L. REV. 942 (1983).

285. Responsible Citizens v. City of Asheville, 308 N.C. 255, 261-62, 302 S.E.2d 204, 208 (1983); A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 214, 258 S.E.2d 444, 449 (1979).

286. Responsible Citizens v. City of Asheville, 308 N.C. 255, 263, 302 S.E.2d 204, 209 (1983).

287. *See supra* notes 215-16 and accompanying text.

288. *See supra* note 217 and accompanying text and text accompanying note 218.

289. *See supra* notes 215-18.

290. *See supra* notes 215-16, 228-29 and accompanying text.

test to determine whether a taking has occurred.[291]

The outcome of the balancing test will depend on the facts and circumstances of each case. The limits of permissible uncompensated beach access regulation have not yet been tested because present legislation does not create rights; it merely recognizes and preserves existing public rights of access.[292] Legislation creating public easements, however, effectively would grant property rights to the public. Under the regulatory balancing test, this does not itself constitute a taking but it does place a heavy burden on the government to show that the public benefits outweigh the private harm.[293] Furthermore, it is possible that such legislation would be held to be an exercise of the state's eminent domain power, so that compensation would be due the landowner.

Beach access legislation, if it is to be efficient and uniform, cannot possibly take into account the "facts and circumstances" of each case. Broad legislation proposing to vest public easement rights in the dry-sand area is, by its nature, vulnerable to a taking challenge. This is true because in some beach areas the private interest outweighs the public interest, while in others the opposite conclusion is compelled. Judicial decisions, however, must take into account the facts and circumstances of each case. They are less vulnerable, therefore, to the challenge that either public or private interests in a particular piece of property were not considered. Furthermore, the only fairness to be achieved by beach access legislation is uniformity of application. In the taking context, however, fairness is achieved only when the effects on the individual landowner are considered and balanced with the public interest. This balancing can be accomplished only in a judicial proceeding.[294]

B. *Approaches to Beach Access Legislation*

Existing legislation[295] takes three basic approaches to beach access. The

---

291. *See supra* note 230 and accompanying test.

292. The political constraints imposed by the perception of what is appropriate regulation may partly account for this. *See* F. BOSSELMAN, O. CALLIES & J. BANTA, *supra* note 279, at 318 ("[T]he fear of the takings issue is stronger than the takings clause itself.").

293. *See* Sax, *supra* note 214, at 170; *see also supra* notes 238-51 and accompanying text (discussion of balancing public benefits and private harm).

294. See *supra* note 187 and accompanying text for an example of a court balancing public and private interests in a beach access decision.

295. CAL. GOV'T CODE §§ 53035-53036, 54091-54093 (West 1983); CAL. PUB. RES. CODE §§ 30210-30224 (West 1977 & Supp. 1985); HAWAII REV. STAT. § 115 (1976 & Supp. 1984); OR. REV. STAT. § 390.605 -.630 (1983); N.C. GEN. STAT. §§ 113A-134.1 to 134.3 (1983); TEX. NAT. RES. CODE ANN, §§ 61.001-.131 (Vernon 1978); V.I. CODE ANN. tit. 12, §§ 402-403 (1982).

Three federal Open Beach Bills have been proposed but never passed. The Eckhardt Open Beaches Bill, H.R. 10394, 93d Cong., 1st Sess. (1973), would have impressed the nation's beaches with a public right of free access and use and would have prohibited obstruction of the beach area. The National Open Beaches Act of 1971, S. 631, 92d Cong., 1st Sess. (1971), would have established a presumption that the public has a right of access to and over the beaches and would have appropriated funds to acquire public access easements. The Open Beaches Act of 1969, H.R. 6656, 91st Cong., 1st Sess. (1969), would have established a similar presumption and appropriated funds for public easements.

Denmark has enacted public access legislation establishing a right of public travel in the dry-sand area. The right includes temporary recreational use of private property, exclusive of 50 meters around inhabited buildings. Furthermore, if upland access is insufficient, the Minister of the Envi-

first approach creates a presumption that title of the littoral owner does not include the right to prevent the public from using the dry-sand area.[296] The second makes the issuance of development permits contingent upon the developer's dedication of public accessways.[297] The third authorizes acquisition, improvement, and maintenance of public accessways.[298]

The Texas Open Beaches Bill[299] exemplifies the first approach. The statute creates a presumption[300] that public rights of access exist in the dry-sand area.[301] Beyond this, the statute merely provides a means by which "members of the public may enforce such collective rights as they may have legally acquired by reason of dedication, prescription, or which they may have retained by continuous right."[302] Although the bill is prefaced with a strong public policy statement in favor of public access,[303] it protects public access only if the public already has acquired the rights set forth in the bill. Thus, the bill lacks any significant legal utility; public rights still must be established by judicial proceeding.

There are, however, two valuable aspects of the Texas legislation. First, the presumption of a public right of access shifts the burden of proof to the landowner to establish the right to exclude.[304] Second, in directing the attorney general to seek injunctive relief for removal of obstructions, the bill saves individual plaintiffs the expense of litigation.[305]

The second approach, compulsory dedication, requires developers to dedicate public easements for beach access in return for development permits.[306] This approach has several advantages. First, because developers bear the cost, it is inexpensive to the public.[307] Second, it does not require prior public use of a

---

ronment can require the municipality to establish a public accessway, although compensation may be due the landowner. *See* Rehling, *Planning and the Coastal Zone—An Overview of the Danish Approach*, 4 URB. LAW & POL'Y 189, 193 (1981).

296. TEX. NAT. RES. CODE ANN. §§ 61.020(1)–(2) (Vernon 1978); V.I. CODE ANN. tit. 12, §§ 402-403 (1982).

297. CAL. PUB. RES. CODE § 30212 (West 1977 & Supp. 1985).

298. *Id.* §§ 31400-31406; N.C. GEN. STAT. § 113A-134.1 (1983).

299. TEX. NAT. RES. CODE ANN. §§ 61.001–.131 (Vernon 1978 & Supp. 1985).

300. The presumption gives the plaintiff a prima facie case in favor of the public's right of use. Note, *The Texas Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 387 (1976). Although constitutional problems "are raised by the creation and use of presumptions in criminal cases," the problems are not as serious in civil cases. C. MCCORMICK, EVIDENCE § 345, at 985 (3d ed. 1984). It is "extremely unlikely that there are now serious constitutional limits on the effect that may be given to presumptions in civil cases." *Id.* at 987.

301. TEX. NAT. RES. CODE ANN. § 61.020 (Vernon 1978). A prima facie case of a public access right is made out upon a mere showing that the disputed area is the dry-sand beach. The court in Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 930 (Tex. Civ. App. 1964) refused to address the constitutionality of this presumption.

302. Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 930 (Tex. Civ. App. 1964).

303. "It is declared and affirmed . . . that . . . the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico." TEX. NAT. RES. CODE ANN. § 61.011 (Vernon 1978).

304. *See id.* § 61.020(1).

305. *See id.* § 61.018.

306. *See* CAL. PUB. RES. CODE § 30212 (West Supp. 1985). *See generally* R. DUCKER, *supra* note 8, at 55-68, 141-54 (discussion of compulsory dedication).

307. *See* Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 572 (1970). The expense to the

beach area.[308] Third, it can prevent litigation by eliminating conflict in rapidly developing areas.[309] Last, there are probably no constitutional problems with compulsory dedication.[310] California's compulsory dedication statute[311] was challenged as an unconstitutional taking and was found to be constitutional.[312] The California Supreme Court held that "[a] regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development."[313]

North Carolina law permits compulsory dedication of land for recreational purposes in subdivisions.[314] Dedicated areas, however, are required to serve only residents of "the immediate neighborhood within the subdivision."[315] It is not clear whether these areas could be used by nonresidents of the subdivision.[316]

The third approach to beach access legislation—acquisition of easements through public funds—is the approach taken by North Carolina and is considered below.

C. *Beach Access Legislation: The North Carolina Approach*

The North Carolina Coastal and Estuarine Water Beach Access Program[317] was enacted in 1981[318] in response to a controversy over setback regu-

---

public actually is no less than that of easements created by common-law dedication because implied dedication easements are "free" to the public. Under the California statute new developments must provide public accessways from the "nearest public roadway to the shoreline and along the coast." CAL. PUB. RES. CODE § 30212(a) (West Supp. 1985). The accessway is not required to be open to the public, however, until a public agency or private association agrees to accept liability and responsibility for maintenance of the accessway. *Id.* Acceptance of the dedication, then, is required of the municipality, unless a private acceptance is offered.

308. *See* Note, *supra* note 307, at 571.

309. *See id.*

310. *See generally* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 28, § 9.17, at 594-99 (discussion of constitutionality of compulsory dedication). One commentator has argued that "no settled constitutional doctrine has been created" for compulsory dedication. Note, *supra* note 307, at 570.

311. CAL. PUB. RES. CODE § 30212 (West Supp. 1985).

312. Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal. App. 3d 678, 698-99, 183 Cal. Rptr. 395, 407-08 (1982). The court found the required easements to be " 'reasonably related' to one of the principal objectives of [California's] Coastal Act which is to provide for maximum [public] access to the coast." *Id.* at 700, 183 Cal. Rptr. at 407-08. This is the same standard used by North Carolina courts to determine whether legislation is unconstitutional local legislation. *See supra* notes 261-66 and accompanying text.

313. Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal. App. 3d 678, 699, 183 Cal. Rptr. 395, 407 (1982).

314. N.C. GEN. STAT. § 160A-372 (1982).

315. *Id.*

316. Exclusion of nonresidents could raise equal protection questions. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972) (municipality may not restrict nonresidents' use of public beach by means of fee differentials); *see also* Brindley v. Borough of Lavallette, 33 N.J. Super. 344, 349, 110 A.2d 157, 159 (Law Div. 1954) (ordinance prohibiting nonresidents from using public beach held invalid). The beaches in these cases had been dedicated to the public by the municipality, not private owners. *See also* Note, *Non-Resident Restrictions in Municipally Owned Beaches: Approaches to the Problem*, 10 COLUM. J.L. & SOC. PROBS. 177, 184-91 (1974) (discussing equal protection clause as applied to restrictions of municipal beaches).

317. N.C. GEN. STAT. §§ 113A-134.1 to -134.3 (1983).

318. Act of July 10, 1981, ch. 925, 1981 N.C. Sess. Laws 1422. To date, 1.2 million dollars has

lations[319] imposed on oceanfront development.[320] The legislation directs the state to "establish a comprehensive program for the identification, the acquisition, improvement and maintenance of public accessways to the ocean and estuarine beaches."[321] The access program is coordinated with the state's coastal management program;[322] funding is provided through annual appropriations by the North Carolina General Assembly.[323] The Coastal Resources Commission adopts program standards and gives priority "to acquisition of lands which, due to adverse effects . . . of natural hazards, such as past and potential erosion, flooding and storm damage, are unsuitable for the placement of permanent structures."[324]

The Beach Access Program statute notes long-standing public use of the State's ocean beaches among the legislative findings that preface the statute's substantive provisions:

> The public has traditionally fully enjoyed the State's ocean and estuarine beaches and public access to and use of the beaches. The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State. The ocean and estuarine beaches are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State.[325]

The findings recognize, however, that public access is "becoming severely lim-

---

been appropriated. Most of the funds have been used for regional projects and for improvements to state-owned lands or lands obtained by local governments through grants or donations. An appropriation of $500,000 has been recommended for 1985 and 1986. Telphone interview with David Owens, Assistant Director, Division of Coastal Management, Coastal Resources Commission (Jan. 4, 1985).

319. Setback regulations regulate the "distance from a curb, property line, or structure, within which building is prohibited." BLACK'S LAW DICTIONARY 1230 (5th ed. 1979). *See generally* D. HAGMAN, *supra* note 73, § 60 (1975) (explaining use of setback regulations in land use law).

320. *See* Owens, *Land Acquisition and Coastal Resource Management: A Pragmatic Perspective*, 24 WM. & MARY L. REV. 625, 652 (1983). To prevent property loss the CRC adopted regulations in 1979 requiring minimum setbacks. "[W]hen combined with local highway setback and septic tank restrictions," the CRC's regulations "rendered many small oceanfront lots impossible" to develop. *Id.* The general assembly initially addressed the issue of compensation for property owners who had been denied building permits because of setback restrictions. A Coastal Land Acquisition Fund would have purchased the restricted lands for public use as accessways. S.B. 232, 1981 N.C. General Assembly. This bill was superseded by the enacted bill establishing a permanent acquisition program. 1981 N.C. Sess. Laws 925.

321. N.C. GEN. STAT. § 113A-134.1 (1983). The authority given is for direct purchase of accessways; the program does not authorize an exercise of eminent domain power.

322. *Id.* § 113A-134.2.

323. Interview with David Owens, *supra* note 318. State funds may be supplemented by local matching funds. *Id.*

324. N.C. GEN. STAT. § 113A-134.3 (1983).

Funds are used for regional projects, neighborhood projects, local projects, or signs. Regional projects include restrooms, 25 or more parking spaces, a dune crossover, and trash containers. DIVISION OF COASTAL MANAGEMENT, COASTAL RESOURCES COMMISSION, BEACH ACCESS PROJECT FUNDING: 1982 PROJECTS 2 (1982) (available from Division of Coastal Management, Coastal Resources Commission, Raleigh, North Carolina). Neighborhood projects include five to ten parking spaces, a dune crossover, and trash containers, and may include handicapped facilities. *Id.* Local projects include trash containers and may or may not include a dune crossover. *Id.* Signs indicating beach accessways have a beach access logo and the name of the city or county where the accessway is located. *Id.*

325. N.C. GEN. STAT. § 113A-134.1 (1983).

ited in some areas" and that "[p]ublic purposes would be served by providing increased access."[326] Finally, the statute declares that placement of "permanent substantial structures on [hazardous oceanfront lots] will lead to increased risks of loss of life and property, increased public costs, and potential eventual encroachment of structures onto the beach."[327]

North Carolina's approach to beach access legislation "establishes an affirmative role for state government in identifying, acquiring, improving, and maintaining public access to the beaches,"[328] a role previously reserved for local governments.[329] Furthermore, the program has several advantages over other approaches. First, because all accessways are purchased from the landowner rather than acquired through the police power, the state avoids a taking challenge. Second, the program assures perpendicular access[330] in areas where previous public use may be insufficient to satisfy common-law doctrines of prescription, implied dedication, and custom.[331] Third, it obviates any need for litigation to establish public rights of use because all easements are acquired by direct purchase.[332] Last, it places the burden of paying for access on the public, rather than on individual landowners.

V. CONCLUSION

The North Carolina Beach Access Program is the most effective and appropriate legislative tool to provide upland access to the beaches. Use of the dry-sand area for recreation and access to the foreshore, however, cannot be provided by the program because of the prohibitively high cost of beach land. Legislation establishing public rights in the dry-sand area is not recommended because it invites litigation and presents serious constitutional problems. Attempts to establish public rights in dry-sand areas by prescription, implied dedication, and custom are unlikely to be successful in the North Carolina courts. Furthermore, extension of these doctrines to provide beach access would confuse their traditional application in settled areas of the law.

This Comment recommends that the North Carolina courts expand the public trust doctrine to include recreational use of the dry-sand beach. This

326. *Id.* Regulations adopted under the statute define the beach as "an area extending from the mean low to the mean high water line and beyond this line to where either the growth of vegetation occurs or a distinct change in slope or elevation occurs, or [land]owners have specifically and legally restricted access above the mean high water line." N.C. Coastal Resources Comm'n Reg., 15 N.C. ADMIN. CODE 7M.0302(c) (1985). The regulations state further that "[t]his definition is intended to describe those shorefront areas customarily freely used by the public." *Id.* The definition, however, is a policy statement only and does "not in any way require private property owners to provide public access to the beach." *Id.*

327. N.C. GEN. STAT. § 113A-134.1 (1983). This concern resulted in regulations prohibiting permanent seawalls and bulkheads from ocean beaches. N.C. Coastal Resources Comm'n Reg., 15 N.C. ADMIN. CODE 7H.0308(2) (1985).

328. Owens, *supra* note 320, at 653.

329. *Id.* at 653 n.135.

330. "Perpendicular access" means access to the beach over upland property.

331. The Texas Open Beaches Bill presents this problem. *See supra* notes 299-305 and accompanying text.

332. *See* N.C. GEN. STAT. § 113A-134.3 (1983).

recommendation is made not only because of the limitations on the other common-law doctrines, but also because the public trust doctrine historically has been tied to the oceanshores and gives the state an affirmative "duty . . . to protect the people's common heritage of streams, lakes, marshlands and tidelands."[333] Traditionally, the public trust "functioned as a restraint on the states' abilities to alienate public trust lands."[334] More recently, it has evolved "into a source of positive state duties,"[335] and a "common law principle flexible enough to meet diverse modern needs."[336] Judicial expansion of the doctrine, however, should be limited to those areas in which it is necessary to satisfy the public interests protected by the trust.[337] The courts must not recognize public trust rights in private beach land without balancing public and private interests. In areas of diminishing public beaches or increased public demand, the public interest in access to and use of private dry-sand beaches will naturally be greater than in areas where public access is not a problem or not in demand. The public trust doctrine is meaningless without access to the foreshore and recreational use of the dry-sand beach. As more people seek solace and recreation at the "extremest limit of land,"[338] the North Carolina courts should adapt the public trust doctrine to meet the changing public needs.[339]

ALICE GIBBON CARMICHAEL

333. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 360-61, *cert. denied*, 104 S. Ct. 413 (1983).

334. District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1082-83 (D.C. Cir. 1984).

335. *Id.* at 1083.

336. *Id.*

337. *See supra* note 187 and accompanying text.

338. H. MELVILLE, *supra* note 1, at 3.

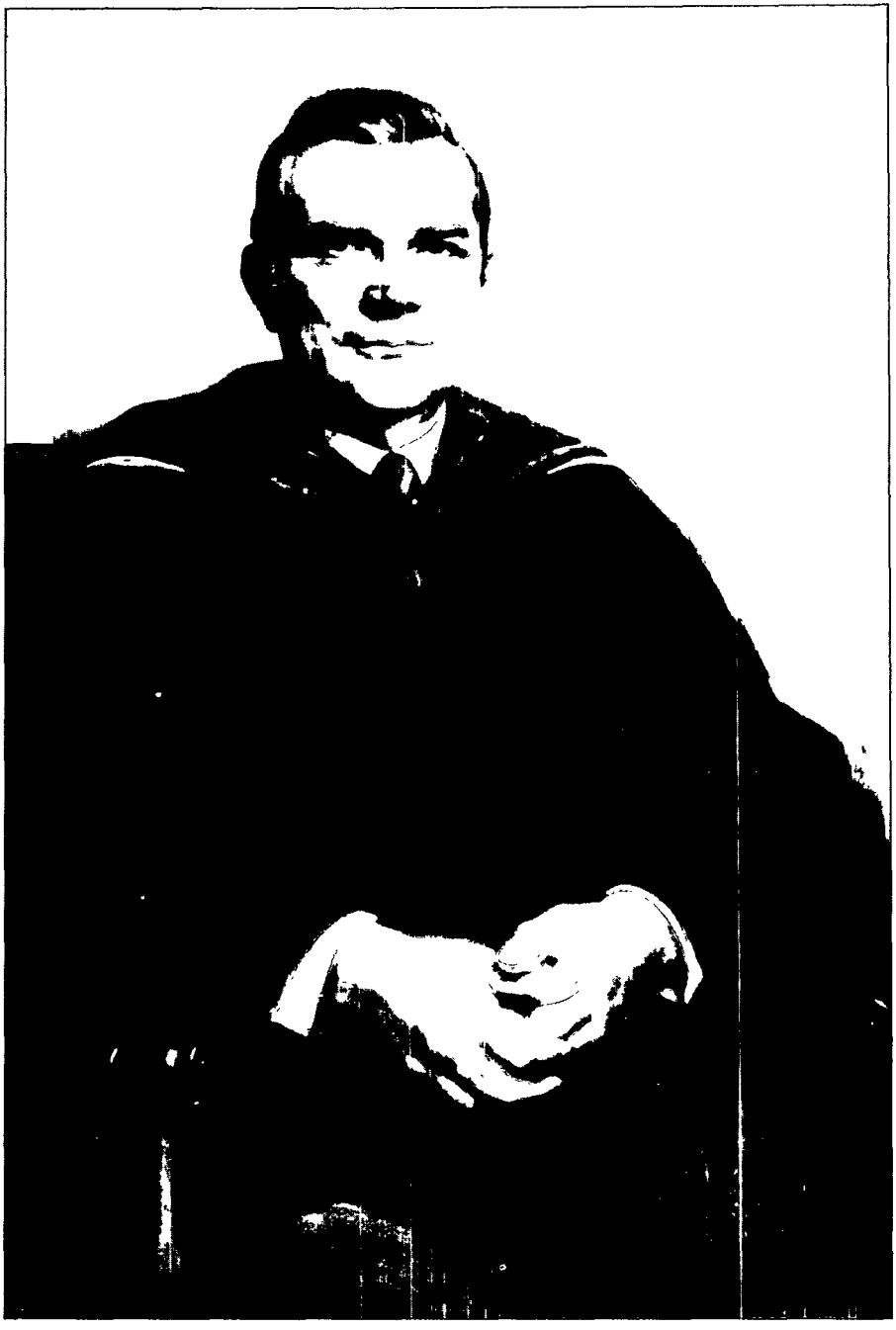
339. *See* 1 WATER & WATER RIGHTS, *supra* note 138, § 36.4(B), at 202 ("The law regarding the public use of property held in part for the benefit of the public must change as the public need changes."). The court in Woodman v. Pitman, 79 Me. 456, 10 A. 321 (1887), eloquently stated this same idea:

> The inexhaustible and ever-changing complications in human affairs are constantly presenting new questions and new conditions which the law must provide for as they arise; and the law has expansive and adaptive force enough to respond to the demands thus made of it; not by subverting, but by forming new combinations and making new applications out of, its already established principles,—the result produced being only the "new corn that cometh out of the old fields."

Id. at 458, 10 A. at 322.

DEDICATION

The Board of Editors and Staff of the *North Carolina Law Review* dedicate this issue to Professor William Brantley Aycock on the occasion of his retirement from the faculty of the University of North Carolina School of Law.



WILLIAM BRANTLEY AYCOCK